THE LEAGUE COUNCIL IN ACTION

A STUDY OF THE METHODS EMPLOYED BY THE COUNCIL OF THE LEAGUE OF NATIONS TO PREVENT WAR AND TO SETTLE INTERNATIONAL DISPUTES

BY

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OXFORD UNIVERSITY PRESS
LONDON: HUMPHREY MILFORD
1929

Printed in Great Britain

TO

MY FATHER

AUTHOR'S NOTE

I WISH to express my deep appreciation of the kindness and friendly interest shown by Professor J. L. Brierly in reading the manuscript and advising on several points.

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September 30, 1929.

CONTENTS

PART I

THE LEGAL BASIS OF THE AUTHORITY OF THE COUNCIL OF THE LEAGUE OF NATIONS TO SAFEGUARD PEACE

(Articles IV, X—XVII, of the Covenant)

PART II

WAR OR THREAT OF WAR

Separating the Combatants—The Council restores peace by resorting to preventive measures in accordance with Article XI of the Covenant.

PART III

DISPUTES LIKELY TO LEAD TO A RUPTURE

CONCILIATING THE DISPUTANTS

The Council acts as a Conciliation Commission in accordance with the principles laid down in Article XV of the Covenant.

ABBREVIATIONS

O. J. = *League of Nations Official Journal.*

O. J., S. S. = *League of Nations Official Journal, Special Supplement.*

P. V. C. = *Procès Verbaux of the Proceedings of the Council.*

PART I

THE LEGAL BASIS

of the

COUNCIL'S AUTHORITY TO SAFEGUARD PEACE

(Articles IV, X–XVII of the Covenant)

I

LEAGUE MEDIATION

THE League of Nations has grown out of its infancy and cast aside its swaddling clothes. Its essential task —the preservation of peace—has been put to the test of many years' experience. During the first decade of its existence, it handled no less than twenty-three international disputes [1] in fulfilment of the duties placed upon it by the Articles of the Covenant. In the task of preventing war and settling disputes that might have led to war, the Council—the executive instrument of the League—may well be regarded as having passed out of the experimental stage, and the moment may be appropriate for a study solely devoted to the peace functions of the Council.

Hitherto most of the estimates of the Council's capacity to preserve peace have necessarily been based on a theoretical interpretation of the Covenant, and students have sought to give some solidity to their speculations by regarding closely the circumstances of the origins of the Covenant, and emphasizing the intentions of its drafters: for this purpose they have available a wealth of documentation such as no other institution can boast of. Henceforward, however, students will break fresh ground and base their estimates on the actual practice of the Council. They will describe, to quote the words of Mr. Hunter Miller,[2] 'what has happened under the document as finally written, how the world lives with the Covenant, and how international relations are actually conducted'.

The disputes which have already occurred furnish ample material upon which attempts can be made to form an early estimate of the practical significance of the Covenant. The method which seemed to the writer best fitted for the

[1] See Appendix II, p. 278.

[2] *The Drafting of the Covenant*, by David Hunter Miller, p. 555.

task lay in a comparative study of the cases, rather than in an analysis of each one. The latter course would have provided little more than a series of unrelated facts, which would scarcely have enabled one to test the effectiveness of the various parts of the League's peace machinery. The method chosen seems to be justified by its fruits. It has revealed to an unexpected extent how far practice has enlarged the conception of the duties and powers of the Council acting in pursuance of the Covenant. It has also shown how the Covenant adapts itself to changing needs and unforeseen contingencies—the supreme test of a constitution. The actions of the Council thus regarded reveal, for instance, how one Article of the Covenant acquires predominant importance, whilst the significance of another Article correspondingly diminishes, and how practice may almost nullify the effect of some clauses and enlarge to an amazing degree the scope of others. The most striking example of such a shifting of emphasis is the extent to which Article XI of the Covenant has replaced Article XVI as the shield of international security—Article XI, in accordance with which the Council, as we shall show, takes action to separate the combatants and effect the cease fire, as opposed to Article XVI, which authorizes the Members of the League to make war against an aggressor.

The cumulative effect of this comparative analysis is to stress the significance of the Covenant as the source of a growing jurisprudence regulating international relations—a body of law capable of growth because it is administered by a regularly constituted organ—the Council of the League—directly representing most of the Governments of the world and meeting at regular and frequent intervals. What in fact we are examining is the development of a jurisprudence based on new principles in international law, principles which we may group under the name of 'League mediation'.

The work of the League of Nations is effecting such a fundamental change in the nature of inter-State rela-

tions that old landmarks are ceasing to be distinctive or adequate. For the character of League mediation is something quite without precedent in international history: it has its own peculiar laws and practices; for instance, it may be regarded as obligatory mediation, and yet obligatory mediation as understood in pre-League days would not always be a correct description. In the old sense it could only mean intervention—an interference, either forcible or backed by a threat of force, made by a State not a party to the dispute. Under the Covenant, on the other hand, a party to a dispute is legally bound in certain circumstances to request the mediation of the Council.[1] Again, it is the duty of Members of the League, not parties to a dispute, to set in motion League machinery, if the parties have not hitherto done so, with a view to putting an end to a sudden outbreak of hostilities or to settle a dispute likely to lead to a rupture; and the character of such mediation may vary greatly from dictatorial interference to conciliation, persuasive exhortations and the offer of good offices, but behind each action remain in reserve the constitutional powers of the Council, which invest each of its mediatory actions with unique authority. Again, League mediation differs from ordinary mediation in the fact that the parties to the dispute appear before a majority of neutral Powers, comprising the Members of the Council, and the relation of that fact to the character of League mediation will be shown in the course of this study.

All these factors build up for the first time in history a regular system of mediation, the laws and practices of which it is the purpose of this study to attempt to make clear. It will be seen that this system is not something with a separate existence functioning in Geneva: it interpenetrates all the relations of States with one another which are Members of the League: the system is something organic and fundamentally changes the character of international relations, the effect of which has not yet

[1] See p. 11.

perhaps been adequately accounted for by writers on international law, and which surely requires a more adequate treatment than can be afforded by new editions of old text-books. The Covenant takes precedence over all other treaties and international obligations incurred by States, and requires, if it is to be properly appreciated, an entire recasting of one's conception of the rules governing inter-State relations.[1]

The League system of mediation, in fact, strikes out a new path towards the attainment of peace, a path which had scarcely been thought of before 1919. The early nineteenth century illustrates, it is true, an attempt by the great European Powers (Austria, France, Great Britain, Russia, and Prussia) to maintain peace on the foundations of the settlement made at the Congress of Vienna. But, as Sir Frederick Pollock states,[2] 'no regular method was provided for securing agreement or resolving differences'; their purpose was not primarily the organization of peace, but to restore old dynastic systems regardless of nationalistic aspirations, and this was doomed to failure from the outset. During the second half of the nineteenth century, from the time of the Congress of Paris (1856), as Sir Frederick Pollock points out, endeavours were made 'to settle matters of common interest by special conferences, and to restrain war within moderate limits of space when it could not be wholly avoided', but the proposals to hold conferences were not always accepted; no rule, law, or system established and developed the custom, and in the opinion of Sir Frederick 'it would be rash to say when these conferences prevented war', and he concludes that 'it would be unprofitable to speak in detail of the varying diplomatic meetings of this period'. It is

[1] Professor Brierly's brilliant study, the *Law of Nations* (Clarendon Press, 1928), marks the first attempt entirely to restate international law in the light of the Covenant, and it is significant that the sub-title reads 'An Introduction to the international law of peace', thus indicating in a striking way the change brought about by the League system.

[2] *League of Nations*, Sir Frederick Pollock, p. 14.

worth noting, however, that in the Treaty of Paris (1856) and the Treaty of Berlin (1878) the European Concert created a legal obligation binding on the signatories to resort to mediation in certain limited circumstances, but even so, the object was not so much the preservation of peace as the fulfilment of political aims; in the first case, for instance, the Great Powers aimed at placing Turkey under their protection against Russian encroachments.

Despite its limited purpose, the provision requiring mediation in the Treaty of Paris stirred enlightened people in England at the time to press Lord Clarendon to work for a more general requirement, and in fact the 23rd Protocol of the Congress of Paris, to which more than forty States adhered, stated that if a serious dispute arose, the parties, before going to war, would resort, as far as circumstances allowed, to the good offices of a friendly Power.

The Protocol, however, was merely a *vœu* and remained a *vœu*. The public-spirited people who had succeeded in promoting it left matters there and turned their attention to arbitration. As M. Politis—a resourceful Greek lawyer now famous in League circles—stated in an interesting essay on 'The Future of Mediation',[1] 'the cause of arbitration alone profited by the event .... The friends of peace exploited it with that end in view without recognizing that they would have rendered far greater services to the cause of peace if they had applied their efforts first to the development of mediation.'

Arbitration (by which is meant a definite legal process resulting in an award binding on the parties, in the formulation of which they have had no voice) was held to be the one alternative to war, upon which the energies of progressive people were concentrated. Their efforts always broke against the formidable barrier of vital interests: no nation was prepared in advance to declare that it would accept the award of a third Party on any

[1] 'L'Avenir de la Médiation', *Revue Générale de Droit International Public*, 1910, vol. xvii, p. 136.

question seriously affecting its life. Mediation and conciliation, on the other hand, offered a means of avoiding this formidable obstacle; but people generally did not foresee the possibilities of a compulsory system of mediation, constantly developing, with almost watertight checks and safeguards against war, brought into use when an agreement as to a settlement could not immediately be attained. Even at the Hague Conferences of 1899 and 1907 attention was still centred on arbitration, although the Governments represented at the Conferences so restricted its scope as to render it valueless as a means of preventing war. A reference by Westlake to the attitude of the Hague Conference of 1907 towards arbitration throws a flashlight on the position: 'it must be mentioned', he wrote, 'that an attempt was made, on a British proposal, to frame a list of subjects on which arbitration should be obligatory. Only eight subjects obtained in Committee a majority in favour of their inclusion in such a list, and among these were such as weights and measures and the tonnage of ships. The attempt accordingly failed amid some public hilarity.'

Finding progress so difficult in that direction, the Hague Conference did not attempt to explore the possibilities of making mediation compulsory. Provision was made for mediation, but of so half-hearted and optional a character as to be useless. Even Westlake imagined that the only way to avoid the barrier of vital interests lay in the formation of a Super-State. 'The exception of vital interests and honour . . .', he wrote, 'expresses intelligently enough the bedrock against which all arrangements must be brought up until the international society is provided with a Government.'

The institutions of the League of Nations, born of the hard facts and the bitter experience of the World War, and owing little to the past, are the first to embody a workable system in which dangerously grave disputes involving vital interests, which usually can only be settled by the parties themselves, are, while satisfying this require-

ment, brought under the control of third parties in the person of the Council of the League [1] meeting in public; and a process which may begin as a mediation in the ordinary sense [2] may, as the discussion proceeds, develop in accordance with the technique of League mediation into a quasi-arbitral or judicial method, whilst at every moment war and threats of war are held at bay.

[1] 'The Council includes certain members with permanent, and others with non-permanent, seats. The present permanent members are Great Britain, France, Italy, Japan, and Germany; new permanent members may be elected by a unanimous vote of the Council with the consent of a majority of the Assembly. The non-permanent members, at present nine in number, are elected by the Assembly, which also has power to make rules regarding their election. Under the existing rules, they hold their seats for three years, and are disqualified for re-election for three years after their retirement, except that the Assembly by a two-thirds majority may declare not more than three states to be immediately re-eligible.' Prof. J. L. Brierly, *Law of Nations*, p. 203.

[2] i.e. where a third State conducts negotiations between the disputants. See McNair, p. 9, Oppenheim, *International Law*, vol. i.

II

THE JURISDICTION OF THE COUNCIL

Section I. THE OBLIGATION NOT TO RESORT TO WAR AND THE COUNCIL'S POWERS TO REQUIRE ITS OBSERVANCE

THE mediatory system of the League rests on three main pillars, Article XI, XII, and XV of the Covenant.[1] Article XI confers on the Council, in the event of war or threat of war, an unlimited jurisdiction which enables it to take any action it deems wise and suitable to safeguard peace, whilst Article XV authorizes the Council to act as a kind of conciliation commission[2] and recommend permanent solutions. Article XI effects a provisional peace, and puts an end to hostilities: Article XV finally clears up a situation and aims at a lasting settlement, but in this latter task the competence of the Council may be subject to restrictions.[3]

Article XI in its second paragraph enables the Council to intervene not only in case of war or threat of war, but in respect of any circumstance whatever which threatens to disturb international peace or the good understanding between nations upon which peace depends. Article IV, paragraph 4, possibly extends still further the field of action of the Council, for it 'may deal at its meetings with any matter affecting the peace of the world'.

Again, Article XI *confers a right* on any member of the League, whether he be a party to a dispute or not, to effect the intervention of the Council.[4]

[1] See Appendix for the text of the Covenant.

[2] Dr. McNair in Oppenheim's *International Law* (Disputes), p. 13, describes conciliation as 'the process of settling a dispute by referring it to a Commission of persons whose task it is to elucidate the facts and (usually after hearing the parties and endeavouring to bring them to an agreement) to make a report containing proposals for a settlement, but not having the binding character of an award or judgement'.

[3] See p. 211.

[4] *Vide* par. 1, 'The Secretary-General shall *on the request of any Member* summon a meeting of the Council,' and par. 2, which expressly confers 'a friendly right' on each Member to bring a matter before the Council.

Articles XII and XV (paragraph 1), on the other hand, *impose legal obligations* on particular members of the League, namely, the parties to a dispute.

Article XII obliges a member to submit a dispute to arbitration, or judicial settlement, or inquiry by the Council, if it threatens a rupture, and he may not resort to war until three months after the announcement of the arbitral award or the publication of a Report by the Council. As the Council may make its report within six months of the submission of the dispute, a delay of nine months may thus be imposed.[1]

The obligation to submit a dispute to inquiry by the Council as a last alternative is absolute and unconditional.[2] It is true that Article XII offers a free choice to the Members of 'arbitration or judicial settlement' on the one hand, or 'inquiry by the Council' on the other. But 'arbitration' or 'judicial settlement' is a method that is not imposed on the parties to a dispute by the Covenant.

The meaning of arbitration under the Covenant is not open to doubt. It is a legal process differing in form and not in kind from judicial settlement, both of which in accordance with Article XIII of the Covenant may be suitably used to settle legal disputes, such as the interpretation of a treaty, questions of international law, &c.[3] Both parties are bound in advance by the same Article to accept the award of the arbitrators or the judicial decision of the Permanent Court of International Justice.[4]

In Article XIII the Members pledge themselves to resort to the arbitral method only in cases which *they recognize* to be suitable for such treatment. As Mr.

[1] See, however, pp. 235–42, showing that the Council's duty is to prevent war in all circumstances under Article XI, and the incidence of the Kellogg Pact which seems to transform Article XII into a plain obligation not to resort to war; see proposed amendments to Covenant (p. 242).

[2] Fachiri, *Permanent Court of International Justice*, p. 65.

[3] *Vide* Article XIII, Appendix.

[4] Paragraph 3, Article XIII, a later addition to the Covenant, shows that the words 'judicial decision' obviously refers to an award by the Permanent Court.

Fachiri states, one party 'could not by virtue of this provision claim the right to refer the case, nor would the Court entertain it, in the absence of a special agreement or compromise'. They may then both freely choose such a method, whilst if one of the parties desires this legal process in either form, the Covenant does not oblige the other party to submit to it.

It can refuse, as is shown in the dispute between France and Great Britain relating to the Tunis nationality decrees.[1] Great Britain wished to refer the question to the Court, but the French Government refused to allow matters which it regarded as within its exclusive jurisdiction to be submitted to the judgement of a third party. Thereupon Great Britain exercised its right under Article XV, paragraph 1,[2] to bring the matter at issue before the Council of the League. France again tried to object on the same grounds of sovereignty, but on this occasion no objection could be valid, as Article XV, paragraph 1, gives to any one party to a dispute the unilateral right to submit to the Council any question likely to 'lead to a rupture which is not submitted to arbitration or judicial settlement', and the other party is legally bound to appear before the Council.

Article XV, paragraph 1, in fact establishes the compulsory jurisdiction of the Council to mediate in a dispute.[3] The obligation in Article XV is moreover quite as far reaching as that of Article XII. It extends to every species of dispute without exception, save one, namely,

[1] Unless both parties are signatories to the optional clause of the Statute 36 of the Permanent Court, in which case the jurisdiction of the Court is compulsory. But no example exists of unilateral reference.

[2] See Article XV, Covenant, Appendix.

[3] In the words of Sir Douglas Hogg (now Lord Hailsham), Article XV, 'sweeps in all disputes which have not been covered by the earlier Article XIII, the object being to close the loophole by which any State could possibly take the law into its own hands and prevent the peaceful settlement or adjustment of a dispute. Article XV is intended to cover all cases.' (Permanent Court, proceedings: Tunis Nationality case: submission of British Attorney-General.)

that the dispute must be sufficiently important to be likely to lead to a rupture.[1] And this qualification is not very serious, in view of the fact that no standard is laid down as to what conditions the likelihood of a rupture. For it is sufficient for one of the parties to believe that the dispute is 'likely to lead to a rupture' to ensure that the Council will be 'seised' of it: for the Council 'is not bound either at the request of the other party or on its own authority, and before enquiring into any point, to decide whether in fact such description is well founded. The Council may at all times estimate the gravity of the dispute and determine the course of its action accordingly.'[2]

This far-reaching competence has an important bearing on the question whether a State's obligation in accordance with Article XII to submit a case to inquiry precludes the use of violent measures which may not technically constitute war. Are all violent measures equally forbidden by the Covenant? The question is discussed at length in a later chapter.[3] Here it is sufficient to say that even if a State thinks it may take coercive measures without violating the terms of Article XII, in doing so it occasions a threat of war (Article XI), or gives rise to a dispute 'likely to lead to a rupture' (Article XV), and any member of the League may at once summon an Extraordinary Meeting of the Council in accordance with Article XI, whilst the other party to the dispute could effect the Council's intervention in accordance with Articles XI or XV. The Council will then decide whether the coercive measures constitute a violation of the Covenant, and will endeavour in any case to put an end to them and restore peaceful relations.

Again, reasons of self-defence cannot relieve a State Member of his obligations under Articles XI, XII, and

[1] *Vide* Fachiri, *Permanent Court*, p. 64.

[2] Reply of Committee of Jurists to one of the Questions put by the Council on the conclusion of the Corfu case, approved by the Council, Mar. 13th, 1924.

[3] See p. 82.

XV from asking for the intervention of the Council. If a party finds that he is suddenly attacked and goes to war in self-defence he is legally bound by the Covenant to ask for the intervention of the Council, which will endeavour to separate the combatants, and will itself decide whether the plea of self-defence is justified, and call upon the guilty party to make reparation.[1]

Other attempts at mediation may precede the reference to the Council; the members of the League for instance have frequently bound themselves by bilateral treaties to submit their disputes to conciliation commissions specially appointed by mutual agreement. But such commissions have no *locus standi* under the Covenant, in other words, if they fail to bring about agreement between the two parties, the latter are not absolved from the duty of bringing the dispute before the Council in order to prevent a rupture.

On the other hand, the wording of Article XII seems to suggest that arbitration (or judicial settlement) and inquiry by the Council are mutually exclusive procedures, for the parties agree that they 'will submit any dispute likely to lead to a rupture . . . either to arbitration or judicial settlement or to inquiry by the Council'. If this Article were taken alone, without considering at the same time the effect of other Articles, especially Articles XI and XIII, it might lead one to think that a curious defect in the Covenant was therein revealed. For it seems to imply that if a decision by the Court or even of an *ad hoc* tribunal failed to prevent a rupture, the League Council has no part to play in attempting to safeguard peace.

The real position, of course, is quite different. In the first place, States do not resort to arbitration without a solemn undertaking on both sides to accept the award, in the words of Article XIII 'they will carry out in good faith any award or decision that may be rendered'. Secondly, in the event of a refusal to carry out an award, the jurisdiction of the Council is engaged in the final

[1] See Greco-Bulgar dispute (1925), p. 58.

clause of Article XIII which states that 'the Council shall propose what steps should be taken to give effect thereto'. No case has occurred in which the Council has made use of this right. Under such conditions, if the parties go to war or threaten war because one party is dissatisfied with an award, the Council's jurisdiction is at once engaged by the application of Article XI, which would justify intervention to restore peace without necessarily involving the application of the right to enforce the award. This is exemplified by the conduct of the Council in the dispute between Panama and Costa Rica.[1]

The jurisdiction or competence of the Council enabling it to intervene or to mediate under any circumstances affecting the peaceful relations of Members of the League is thus seen to be of the most far-reaching character, comprehending wars of any kind, threats of war, coercive measures, resort to arms taken in self-defence, disputes not immediately threatening war, or any matter which the Member effecting the submission considers in *his* judgement would be likely to lead to a rupture.

[1] Frontier dispute between Panama and Costa Rica (Mar. 1921):

Panama had refused the arbitral award of the Supreme Court of U.S.A., to which the question had been referred by both parties, whereupon Costa Rica sought to enforce the award by occupying part of the contested region. Hostilities began and the Council, which was meeting in Paris at the time, decided, on its own initiative, to cable to the two Governments reminding them of their obligations under the Covenant. (O. J., Mar.–Apr. 1921, p. 215.)

The parties, in an exchange of telegrams with the League, declared their intention to accept an offer of mediation from U.S.A., Panama's acceptance being conditioned by 'a refusal to accept the terms of the American award', and the troops were withdrawn. Thereupon the Secretary-General telegraphed the gratification of the Council, and the President of the Council sent a message hoping 'that the final arrangement would be successfully reached in accordance with the spirit of the Covenant'. (O. J., Mar.–Apr. 1921, p. 218.)

See also Chapter VI, Part III, p. 240, relating to the Council's duty to prevent war in all circumstances.

Section 2. THE SUBMISSION OF A DISPUTE TO THE COUNCIL

(*a*) *The Articles of the Covenant which authorize 'access' to the Council*

The Council may be 'seised' of a dispute in virtue of Article XI or XV, or IV, paragraph 4; and with either XI or XV may or may not be associated other Articles of the Covenant, X, XII, XIV, or XVII; but Articles XI or XV or IV primarily confers the authority on the Council enabling it to intervene. The association of one of the other Articles with XI or XV is of secondary importance and merely lays emphasis on the particular circumstances which give rise to the appeal for the Council's intervention. For instance, when Bulgaria was invaded by Greek troops in 1925, the Bulgarian Government appealed to the League in virtue of Articles X and XI of the Covenant. The Council's right to intervene and meet in extraordinary session was, however, derived from Article XI, the extent of the Council's powers under Article X being very doubtful.[1] This notwithstanding, the use of Article X on that occasion gave it a significance; it stressed the principle of the territorial integrity of a State implied in the clause, and which the Greek Government was *prima facie* violating.

When Article X alone appeared in a communication to the Secretary-General from Ethiopia directed against an Anglo-Italian agreement which was believed to be a menace to Ethiopian independence, the Secretary-General felt obliged to ask whether the Ethiopian Government desired to place the question on the Agenda of the League.[2]

[1] *Vide* J. L. Brierly, *Law of Nations*, p. 210: 'This Article (X) was largely responsible for the abstention from the League of the United States: but the obligations, if any, that it imposes on States are so indefinite that by an ironical fate it has hitherto proved, and will probably remain, ineffective.'

Vide also Professor Rappard, who when referring to the interpretative resolution with which the 4th Assembly attempted to restrict the scope of Article X, wrote, 'These Articles (X and XVI) have been interpreted almost into insignificance'. (*International Relations viewed from Geneva*, p. 143.)

[2] Ras Taffari, heir to the throne of Ethiopia, prefacing his remarks with the biblical phrase 'Peace be unto you', made a formal protest (June 19th,

When Greece in a dispute with Turkey over a boundary question (Maritza) [1] appealed in virtue of Articles XI and XIV, the use of the latter Article stressed the fact that the dispute turned on the legal interpretation of a Treaty and that Greece desired the Council to ask for an advisory opinion from the Permanent Court, Article XI of course authorizing the intervention of the Council.

Greece again was responsible for the grouping of Articles XII and XV in the submission of her dispute with Italy (Corfu),[2] Article XII in this instance stressing the obligation of members not to resort to war before bringing the matter at issue before the Council, Italy resorting to coercive measures (the bombardment of Corfu) despite the appeal to the League.

In none of the above cases was the additional Article X, XII, or XIV necessary. The association of XI and XVII instanced in the Finnish appeal (Eastern Carelia) [3] against Soviet Russia was conditioned by the fact that Russia was not a member of the League, Article XVII conferring for the purposes of a dispute the obligations of membership on a non-member.[4]

Article IV, paragraph 4, which empowers the Council 'to deal with any matter affecting the peace of the world' has not been used to effect the submission of a dispute by any member of the League. It applies more appropriately to some special action which the Council may take at its meetings, as its wording implies 'the Council may deal *at its meetings* with any matter . . . &c.' If we judge from the practice of the Council, its action under Articles XI and XV cannot be taken except on the request or formal

1926) against the Anglo-Italian agreement, arrived at independently of Ethiopia, intended to afford mutual support in obtaining a concession for the British Government to undertake the conservancy of the waters of Lake Tsana, and for the Italian Government to construct a railway through the country. Ethiopia feared a menace to her independence and integrity (implied in Article X which was mentioned in a later communication). O. J., 7th year, No. II, p. 1517.

[1] See p. 222.

[2] See p. 75. [3] See p. 172. [4] See p. 25.

submission of a member of the League. Article IV, paragraph 4, however, appears to authorize the Council to take action without such formal submission. On two occasions hostilities broke out between members when the Council was sitting (Costa Rica-Panama, March 1921, and Bolivia-Paraguay, December 1928); and in each case the Council appears to have determined to intervene during its sitting on its own initiative without waiting for a formal request from a member. In the latter case, for instance, the Minutes of the Council merely state: 'The Council considered the situation as it appeared from reports in the Press of December 9 to 11, and decided to request its President to send the following telegrams to the two Governments.' The text of the telegrams then follows: the Council meeting in secret session, no other information is given.

Article IV, paragraph 4, has been put to other equally valuable uses, and appears to authorize the Council in certain circumstances compulsorily to transfer the settlement of a dispute from the hands of the disputants to inquiry by an Expert Commission, in order to safeguard the rights of third party Members.[1] The Clause has also been used to establish the Council's right, when its competence was challenged by one of the parties, to proceed with the discussion of the question and to be sole judge of its competence.[2]

Articles XI, XV, and IV, paragraph 4, being thus shown to be the essential clauses authorizing the Council to intervene, their use can be further appreciated by regarding closely the manner in which (1) a disputant effects the submission, and (2) a Member neutral to the dispute brings the matter before the Council or the Council itself intervenes.

(*b*) *The submission by a disputant*

In effecting the submission, a disputant, as the practice shows, may mainly base his request either on Article XI as a whole, or on paragraph 1 or paragraph 2 of Article XI,

[1] See p. 140. [2] Aaland Dispute, see p. 126.

or again on Article XV, paragraph 1. It depends on the circumstances which of these clauses is utilized. No hard and fast rule governs the choice. Article XI as a whole, or paragraph 1, usually provides the authority for an appeal to the Council by a disputant if hostilities have broken out, and a special meeting of the Council is desired. The whole Article, or paragraph 1, is in fact seldom used except in grave cases. On Article XI, Bulgaria for instance based its request for the intervention of the League when Greek troops in large numbers invaded its soil in 1925,[1] and the Council met in extraordinary session within two or three days of the appeal. Again in the Polish-Lithuanian dispute when the rival armies were confronting one another in September 1920,[2] the Polish request was based on Article XI, but as the Council was to meet shortly in regular session, a special summons was not judged to be necessary.

Hostilities or a resort to arms have, in fact, occurred in eight cases[3] dealt with by the Council, and in four of these,[4] one of the parties has resorted to Article XI in calling for the intervention of the Council. In three other cases[5] the intervention of the Council was effected by a party neutral to the dispute, or by the Council as a whole.

Paragraph 2, *Article* XI.

In paragraph 2, Article XI, the intervention of a Member

[1] See pp. 36, 157. [2] See p. 89.

[3] 1. Persia-Soviet Russia, 1920 (bombardment of Enzeli (Caspian Sea) by Russia, Persia appealed to Council in accordance with Articles X and XI: incident at an end when Council met).

2. Poland and Lithuania, 1920.
3. Costa Rica and Panama, 1921.
4. Yugoslavia and Albania, 1921 (several appeals).
5. Greece and Italy, 1923 (Corfu).
6. Great Britain and Turkey, 1924.
7. Greece and Bulgaria, 1925.
8. Bolivia and Paraguay, 1928.

[4] Cases 1, 2, 4, 7 enumerated in above footnote.

[5] Cases 3, 4, 8 above.

is described as a 'friendly right'; this expression first occurred in the Hague Convention when it was meant to confer a right on a third party to mediate.[1] The wording of paragraph 2 obviously does not confine its use to States non-disputants. 'The friendly right of each Member of the League' applies equally to the parties in conflict, and the disputants prefer to use it, as being more appropriate in the earlier stages of a dispute when care has to be taken to preserve the friendly atmosphere which may still persist. Disputes submitted in this way do not usually require the immediate attention of the Council and are accordingly reserved for a regular session of the Council.

Such, for instance, was the character of the submission of the first three cases enumerated in the footnote below,[2] in none of which was a threat of war involved. The fourth case (Great Britain and Turkey) shows, however, that it would be a mistake to generalize; for Great Britain resorted to paragraph 2, Article XI, in calling for the immediate intervention of the Council at an extraordinary session in October, 1924, to remove a danger of conflict on the Mosul frontier and establish a line of demarcation between the British and Turkish troops, but even so the request for a special meeting had to be made in an accompanying letter, as Article XI, paragraph 2, does not assume the need for urgent action.

Article XV.

In only two important cases was Article XV relied upon by a party to the dispute in effecting its submission, and

[1] Hague Convention, 1899.

Article 3. Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities. The exercise of this right can never be regarded by one or other of the parties in conflict as an unfriendly act.

[2] Appeals based on par. 2, Article XI, made by disputants occurred in the following cases:

1. Finland and Soviet Russia (E. Carelia), 1923.
2. Bulgaria and neighbouring States (Comitadjis), 1922.
3. Hungary and Rumania (optants), 1923.
4. Great Britain and Turkey (Mosul), 1924. Extraordinary Session.

in each case the choice was determined by the fact that the other party was unwilling to refer the matter to the Council.[1] Great Britain brought the Tunis nationality decree question before the Council, despite French opposition; and Greece under similar circumstances submitted its dispute with Italy (relating to the Tellini murders and the Corfu bombardment). The resort to Article XV, paragraph 1 *in effecting submission* is thus rare, for in the majority of cases neither party has opposed the submission to the Council: on the other hand the *procedure of conciliation* laid down in Article XV applies in most cases (see Part III) submitted in accordance with Article XI.

(*c*) *The submission by a party stranger to the dispute*

Article XI, paragraphs 1 and 2, alone authorizes a Member stranger to a dispute to effect its submission to the Council. The first paragraph gives *any* Member the right to request the Secretary-General to summon a meeting in the event of war or threat of war, whilst the second paragraph confers upon *any* Member 'the friendly right' to bring any circumstance affecting peace before the Council, whether or not war or threat of war is involved.

Third party intervention is the most delicate of all tasks. Prior to the League, it was exercised with difficulty: a State feared to incur the risks to which an interference with the conduct of two other States might give rise; for such a step, however disinterested in its motives, might cause great resentment on the part of one or other of the disputants, either of whom might be inclined to question the good faith of the mediator.[2] Although the machinery of the Covenant eliminates most of these difficulties, it is noteworthy that Great Britain is the only member of the League which has felt able on its single responsibility to

[1] See pp. 12, 75.

[2] During the World War, 1914–18, it was considered at one period 'that a step by the United States, the Vatican, or any other neutral in the direction of peace would be construed by England as an unneutral pro-German move'.

fulfil this duty;[1] the other interventions have been effected by groups of Powers represented by the Supreme Allied Council or the Ambassadors Conference,[2] or by the Council itself collectively taking such action at one of its sittings which has happened to coincide with an outbreak of hostilities in some part of the world.[3] Such action on the part of a third party neutral to the dispute constitutes a right or duty and is not taken in fulfilment of a legal obligation: even if it could be regarded as an obligation, its non-observance could not be laid to the charge of any Member of the League, as all equally would have committed a breach of the Covenant, if we accept such a supposition. On the other hand, the failure of a disputant to request the mediation of the Council (or arbitration, &c.) before resorting to war constitutes a definite violation of the Covenant and the Council can

[1] Great Britain intervened on two occasions:

1. Aaland Islands case (Sweden and Finland) was brought before the Council by the British Foreign Secretary, Lord Curzon, in accordance with Article XI, par. 2.

2. Yugoslavia and Albania (Yugoslav invasion), November 1921; which caused the British Prime Minister, Mr. Lloyd George, to summon an Extraordinary Session of the Council and threaten Yugoslavia with the application of Article XVI. Article XI was implied but not mentioned. See p. 43.

[2] Disputes referred to the Council by the Ambassadors Conference representing France, Great Britain, Italy, and Japan:

1. Hungary and Yugoslavia (frontier dispute), 1923.
2. Hungary and Czechoslovakia (frontier dispute), 1923.
3. Poland and Czechoslovakia (Jaworzina), 1923, Article XI, par. 2.
4. Memel (Allied Powers and Lithuania), Article XI.
5. The Supreme Council effected the submission of the Upper Silesia question. (Article XI, par. 2.)

In these two last cases the groups of Powers may be regarded as being Parties to the dispute.

[3] Mediation initiated by the Council as a whole at its meeting occurred in two cases of outbreaks of hostilities:

1. Panama and Costa Rica, 1920, see p. 15.
2. Bolivia and Paraguay, 1928.

No Article appeared to be formally invoked and, indeed, a formal mention of the relevant Articles is not always necessary. (See Rutgers Memorandum on Article XI.) C. A. S. 10, p. 29.

take conservatory action under Article XI[1] and (it is theoretically held) may in the last resort make war on the persistent disturber in accordance with Article XVI.[2]

The submission by a Member or a group of Members neutral to the dispute may be effected with or without the consent of the parties to the dispute.

In three of the seven cases cited, the parties approved beforehand the reference to the Council,[3] and none of these threatened war.

In three other cases,[4] the submission took the form of intervention in the sense (generally understood in international law) of an interference, hostilities having broken out in each case; and no objection—if any had been put forward by either of the disputants—would have been valid: as Members of the League they were obliged to appear, before resorting to war, at the Council table (or submit to arbitration).

Again, in a less serious dispute—one 'likely to lead to a rupture'—the parties would be obliged on the submission of another Member of the League to appear before the Council, in fulfilment of the conditions laid down in Article XV, paragraph 1.

[1] See p. 55.

[2] Article XVI has not been applied, and the interpretative resolution of the 2nd Assembly (p. 117) has increased the prevailing doubt as to its practical significance. This study is closely restricted to views based on the practice of the Council and it would be beyond its scope to discuss speculatively the possibilities of the Article. Its 'proper interpretation is by no means clear but it would seem', states Professor Brierly (*Law of Nations*, p. 217), 'that the boycott provisions are intended to be automatic, whereas the military provisions, since there the Council has only a power to recommend, are not.' It is to be hoped, as Professor Brierly states, that the Article will never be put to the test. On two or three occasions the Article has been used as a threat by Members of the Council, though not by the Council in any of its decisions. See p. 115.

[3] 1. Hungary and Yugoslavia,
2. Hungary and Czechoslovakia, } 1923.
3. Poland and Czechoslovakia,

[4] Yugoslavia and Albania, 1921; Panama and Costa Rica, 1920; Bolivia and Paraguay, 1928.

(d) Extraordinary sessions of the Council

The discretion of the Secretary-General.

Special meetings of the Council have been convoked by both methods—twice in response to the disputants in accordance with Article XI, paragraph 1;[1] and three times[2] in response to requests of parties neutral to the dispute, but on each of these occasions the request was based on paragraph 2, Article XI. In every case, the party effecting the submission asked for a special meeting of the Council.

The Secretary-General may comply at once and issue the summons, or he may first consult the Acting President of the Council. In dealing with a request for an emergency meeting the Secretary-General will be guided by the following considerations which Sir Eric Drummond has himself laid down.[3]

'When no definite reference is made to the first paragraph of Article 11 and when, therefore, it is not claimed that such an emergency has arisen as would authorize the Secretary-General, under the terms of that paragraph, to take the initiative in summoning the Council, it is necessary for him to receive, before issuing a convocation, the authorization of the Acting President of the Council, and that the President will, in such circumstances, desire to consult his colleagues before taking a definite decision.

'The above, however, does not apply when a serious emergency

[1] 1. Persia and Soviet Russia. Persia appealed under Article XI and Council met at a special session, June 14th, 1920.

2. Greece and Bulgaria: Bulgaria's appeal—Article XI: special session of Council held at Paris within two or three days, Oct. 26th.

[2] 1. Upper Silesia: M. Briand on behalf of Supreme Council of Allies asked for special meeting, which took place Aug. 12th, 1921 (Article XI, par. 2).

2. Yugoslav-Albania Dispute. British Government requested special meeting: took place Nov. 18th, 1921, Paris (Article XI, par. 2).

3. Turkey-Great Britain (Iraq). British Government requested special meeting: took place Brussels, Oct. 27th, 1924 (Article XI, par. 2).

In all but the second case an interval of ten to fifteen days took place between the despatch of the request and the actual meeting of the Council.

[3] In a reply to the President of the Committee of the Council, Sept. 21st, 1926, *vide* Documents of Preparatory Commission for the Disarmament Conference (Geneva 1927) series III, p. 90.

arises, in which case the Secretary-General has the right and duty of summoning the Council on his own authority, provided that he has received a request from any one Member of the League.'

A later passage reads:

'No procedure has been laid down to govern the action of the Secretary-General under the first paragraph of Article 11, and it seems essential that he should remain free from all necessity of following any sort of procedure laid down beforehand in order to avoid any conceivable risk of delay.'

(*e*) *The rights of States not Members of the League: Article XVII*

States not Members of the League have no right of direct 'access' to the Council, that is to say they cannot under any Articles of the Covenant call for the intervention of the Council in respect of a dispute. Before Germany became a Member of the League, an attempt was made by the German Foreign Minister, Dr. von Simons, on March 10th, 1921, to bring before the Council the question of the occupation of the right bank of the Rhine by Allied Troops. In referring to Article XVII, Dr. von Simons stated that 'the German Government already fulfils the preliminary condition for the employment of the above procedure, inasmuch as, for the purposes of the dispute, it accepts the obligations of membership of the League'.

The Article, however, shows that a State cannot directly apply for temporary membership: it has to be 'invited' to attend for the purposes of the dispute. This invitation will not be extended until the 'dispute' has been properly submitted to the Council by a Member of the League; once 'access' has been thus regularly ensured, the invitation to accept the obligations of membership 'shall' then be made. This is evident from the practice and indeed in the light of the Articles of the Covenant.

Dr. von Simons' appeal, for example, was circulated, 'in pursuance of the customary practice', as Sir Eric Drummond informed him, to all the Members of the

League (not only of the Council). By such a device every Member of the League is made aware of a factor that threatens to disturb peace and the question which a non-member wishes to submit could be brought before the Council by one of the Members in virtue of his 'friendly right' under Article XI, paragraph 2.

No Member chose to do so in the German case,[1] the matter accordingly could not be brought before the Council, and the question of inviting Germany could not arise.

Another example illustrating the same principle affecting the rights of non-members is afforded by the appeal of Hungary (under Articles XI and XVII) for the intervention of the Council in the dispute which had arisen with the Little Entente on the question of the return of King Charles IV. Hungary being still a non-member, the Council failed to be 'seised' of the dispute, as no Member, or group of Members, thought fit to bring the appeal to its attention. Thereupon Hungary protested and held that it was the duty of the Council to intervene as guardian of the peace and recalled its action in the Costa Rica and Panama dispute (see p. 15), where it intervened 'although the dispute was not officially brought to its notice'. The reply of the Secretary-General, 'sent in conformity with the instructions of the Council', clearly sets forth the principles which apply:

'Article XI of the Covenant establishes the means by which a question should be brought before the Council: it states that there must first be made a request by a Member of the League and the Secretary-General has then to convene the Council immediately, in pursuance of this request. If the question at issue is in the

[1] Due to the fact that Great Britain, France, Italy, and Belgium, responsible for the measures against which Germany protested, were still acting as Allied Powers. Europe had scarcely shaken itself free of the war atmosphere. The more questionable occupation of the Ruhr a year or so later equally failed to cause an appeal to the Council from any of the Members of the League, although Mr. Lloyd George spoke of the desirability of such action, but the Prime Minister, Mr. Bonar Law, rejected the notion.

nature of a dispute, it is evident that one of the parties to the dispute may bring the matter before the Council, provided that the party is a Member of the League. This course, however, will not be open to a party which is not a Member of the League. Such a State could only inform the Members of the League, either directly or through the Secretary-General of the situation which, in its opinion, threatens the peace of the world, and thus give occasion for a request by one of the Members of the League for the convening of the Council.'

'Article XVII of the Covenant does not lay down any special method of bringing a question before the Council. It simply provides a method for extending the action of the Council to non-members of the League and it assumes that the question has been duly submitted to the Council. In other words, with regard to convening the Council, the Secretary-General has no more right of initiative by virtue of Article XVII, than by virtue of Article XI of the Covenant.' [1]

The privilege thus conferred by Article XVII on a non-member is a right to a seat at the Council table, when the dispute has been regularly 'submitted' by a member. For the non-member in such circumstances 'shall' be invited to accept the obligations of membership for the purposes of the dispute. These obligations and rights include not only the application of Article IV, paragraph 5 (the right to a seat at the Council table possessed by all Members of the League during discussion of matters affecting their countries), but also those of Articles XII to XVI (in accordance with paragraph 1, Article XVII).

There have been several cases of States non-members appearing at the Council table. Finland [2] (1920 in the Aalands dispute with Sweden), Lithuania [3] (1920 dispute with Poland), Turkey (frequently in the course of disputes with Greece): in each of these cases the dispute was submitted by a Member of the League, and once 'access' was thus regularly ensured, the right of the non-members was exercised automatically with little or no formality.

[1] O. J., Feb. 1922, p. 132.
[2] See p. 150.
[3] See p. 89.

In none of these cases were any special conditions imposed (Article XVII states 'upon such conditions as the Council may deem just', paragraph 1), save in two cases, namely, the requirement of the consent of the disputant Member.[1] These conditions would not probably be of such a character as to impair the footing of equality on which the Member and non-member disputants should be placed in accordance with the spirit of the Covenant. During the course of the dispute between Turkey and Great Britain (Mosul) an interesting statement was made by Lord Balfour at a Council meeting relating to a suspicion entertained by Turkey, a non-member, to the effect that it would not receive equality of treatment if the dispute were referred to the League, a suspicion based, according to Lord Balfour, on the above-quoted words of Article XVI. 'It was possible', declared Lord Balfour, 'to interpret the phrase to mean that it was left open for the Council to say that Turkey would only be asked to take part in its deliberations upon terms of inequality with other members of the Council. This supposition was grammatically justifiable, but it was wholly inconsistent with the intentions and policy of the British Government and, he was convinced, with the intentions and views of his colleagues on the Council. Should Turkey ever be invited to discuss a dispute which had arisen, in the words of Article XVII, between a Member of the League and a State which was not a Member, Turkey might be absolutely confident that she would be welcomed for that purpose as a Member of the League on complete and absolute equality with other members. On that occasion, the British representative would certainly move that the words 'upon such conditions as the Council may deem just' should be interpreted in the sense of full and absolute equality, and he felt that this would be the view taken by every Member of the Council.'

The President of the Council added 'in the name of

[1] Polish-Lithuanian case, p. 11, P. V. C. 9th Session; Aaland case, p. 3, P. V. C. 7th Session.

the Council that a State, not a member of the League . . . would be on a footing of complete equality with other nations and that it could rest assured of the impartiality of the Council'.[1]

The E. Carelia case (Finland and Russia) furnishes a unique example of the conduct of the Council when a non-member refuses to attend.

The matter at issue[2] had been properly submitted by Finland, a Member of the League, and the Council at its meeting decided to ask Esthonia, a Member who had diplomatic relations with Russia, to inform the Russian Government that the Council was disposed to consider the dispute and wished to be informed of Russia's desires in the matter.[2] Russia flatly declined to have anything to do with the League, but the Council proceeded nevertheless to discuss the question in her absence, for paragraph 2 authorizes the Council to proceed with the inquiry 'upon such invitation being *given*'; the Council in pursuance of this provision went so far as to ask for an Advisory Opinion from the Permanent Court to elucidate the issues, the Court, though refusing to give an opinion, approved the legitimacy of the steps taken by the Council.

The inability of a State (non-member) to submit a dispute directly to the Council seems to show a defect in the League's peace machinery. If a State found itself suddenly embroiled in hostilities, and appealed to the Secretary-General for the intervention of the Council, to circularize the appeal to all the Members of the League would be a very ineffective method of dealing with the situation.

The Secretary-General no doubt would prefer to exercise the discretion he possesses when emergency appeals reach him, and would probably get into telephonic communication with the Acting President, who in his turn, acting as representative of his country, might use the

[1] O. J., Mar. 1923, pp. 201–2.
[2] 16th Session, O. J., p. 108.

right possessed by every Member of the League of requesting a special meeting of the Council.[1]

(f) Loyal observance of the Articles.

Effect has been given to these rights of offering mediation and obligations to request mediation on most of the occasions when hostilities between two States have broken out.[2] Failure to take action occurred only in the period immediately succeeding the conclusion of the Great War in 1918, when the world conflagration in fact continued to smoulder in various parts of Europe; Poland fought Russia from 1919–20; Greek troops invaded Turkey in 1919 and the Greco-Turkish war continued until 1922; in the meantime the League of Nations came into being, but the Council did not attempt to deal with either of these wars, despite Dr. Nansen's protest at the 3rd Assembly in respect of the latter case,[3] and that of Mr. G. N. Barnes (British Empire) in respect of the former at the 1st Assembly.

Obviously, one or two failures to apply the Articles were inevitable in the infant days of the League. It would be foolish to expect a perfect working of the machinery

[1] Paragraphs 3 and 4 authorize the Council to take compulsive action if necessary against non-members. They have never been put to the test, and their practical significance remains doubtful, especially in view of the fact that the two largest countries in the world, Russia and U.S.A., are not members. The Article was in fact 'framed on the assumption that no important State would remain outside the League'. (Prof. Brierly.)

[2] Up to the time of writing, 1929.

[3] The 6th Commission of the Assembly considered Dr. Nansen's proposal to hold a conference of the belligerents under League auspices. Mr. H. A. L. Fisher deprecated complicating the negotiations which were in progress and proposed the following resolution with the support of the French and Italian delegates. 'The Assembly, earnestly desirous of securing the restoration of peace in the Near East, notes with satisfaction the proposals for the summoning of a special conference to deal with the situation, and trusts the Council, without interfering with any negotiations now pending, will take such steps as it may deem desirable and justifiable by the state of the negotiations with a view to giving effect to the unanimous desire of the Assembly for the prompt re-establishment of peace.'

when it was incomplete; in other words, at a time when the countries of Central Europe had not yet become members, and the chief Members were still consolidating their conquests of the Great War. From 1924 onwards the Articles have been applied whenever the circumstances called for action, as will be evident in Part II and Part III of this study. The jurisdiction of the Council has proved sufficiently wide to cover disputes of the most varied kinds.

PART II

WAR—OR THREAT OF WAR

Separating the Combatants:

The Council restores Peace by resorting to Preventive measures in accordance with Article XI of the Covenant.

I

THE INTERVENTION OF THE PRESIDENT OF THE COUNCIL

INTRODUCTORY

SEVERAL cases have occurred where disputes between Members of the League have resulted in a sudden outbreak of hostilities, and the intervention of the League has not been sought until fighting has actually begun.[1] In such cases, it is the overriding duty of the Council to bring hostilities immediately to an end on the request of any Member of the League. As we have seen in the previous chapter, the Council, unless it is already in session, cannot move in the matter unless it is requested to do so by a State Member, but, once requested, it has the power to take swift and effective action.

Measures aiming at a cessation of hostilities do not usually complete the duties of the Council in regard to such disputes. It has usually to suggest a solution of the questions at issue which led to hostilities, or to determine which was the aggressor, or to fix the amount of reparations due to the aggrieved Party. In this specific task of finally clearing up the situation, the Council employs methods of conciliation in accordance with the principles of Article XV of the Covenant, which are fully discussed in Part III of this study. The importance of distinguishing clearly between the armistice stage of the proceedings, if one may so term it, and the efforts made to arrive at a final settlement, is self-evident, and this and the succeeding chapters of Part II will be devoted to examining the conduct of the Council meeting strictly in pursuance of Article XI under a threat of war and taking action designed to restore peace or prevent an outbreak of war. The following chapters should provide a means of appre-

[1] See p. 19.

ciating the possibilities offered by Article XI, which has come to be regarded as the corner-stone of the Covenant and the bulwark of the world's peace.

In putting an end to sudden outbreaks, the Council is authorized, in the words of Article XI, to 'take any action that may be deemed wise and effectual to safeguard the peace of nations'. If we examine the expedients which the Council has seen fit to employ under this all-embracing clause, we find that they comprise (*a*) immediate intervention by the President of the Council, who issues a warning to the disputants; (*b*) the immediate convocation of the Council to which representatives of the disputants have also been summoned for the purpose of bringing hostilities to an end; (*c*) the appointment of a commission of officers to supervise on the spot the cessation of hostilities, or to secure the maintenance of the *status quo*, or execute some other provisional arrangement, pending the final settlement of the dispute.

Section I. PRESIDENT'S WARNING REQUEST TO CEASE FIRE

The classic example of intervention by the President of the Council is furnished by the action of M. Briand on the occasion of the Greek invasion of Bulgaria in October 1925. His warning to the Greek and Bulgarian Governments was telegraphed within an hour of his learning by telephone from the Secretary-General at Geneva of Bulgaria's request for the League's intervention, and was in the following terms:

'Paris, October 23 (Friday), 1925.

'Acting President of the Council to the Greek and Bulgarian Governments.

'The Secretary-General, acting under Article XI, has convoked a special meeting of the Council on Monday next in Paris. The Council at that meeting will examine the whole question with representatives of the Bulgarian and Greek Governments. Meantime I know my colleagues would wish me to remind the two Governments of the solemn obligations undertaken by them as Members of the League of Nations, under Article 12 of the

Covenant, not to resort to war, and of the grave consequences which the Covenant lays down for breaches thereof. I therefore exhort the two Governments to give immediate instructions that, pending the consideration of the dispute by the Council, not only no further military movements shall be undertaken, but the troops shall at once retire behind their respective frontiers.

BRIAND.'

The form of the message is instructive. Both disputants are addressed in terms of perfect equality. Both are requested to withdraw their troops behind their respective frontiers, although Bulgaria's appeal to the League and newspaper reports had made known to the world the fact that Greece was actually invading Bulgaria. Each of the disputants receives identically the same message, in each of which the President addresses himself to the 'two Governments'.

The value of this procedure cannot be too highly estimated. This method places upon the President of the Council the single task of separating the combatants, without involving himself in other issues. For instance, he avoids at this stage having to deal with the difficult question of the aggressor, and the following pages will show that this thorny question will not obtrude itself at any stage of the 'armistice' proceedings of the case under consideration.

Another difficulty which may seem formidable in theory fades away when we examine the practice. The obligation not 'to resort to war', incurred under Article XII, and to submit a dispute to the Council, might at first sight require a definition of 'war'. Under international law coercive acts are permissible in certain circumstances, although to the common man they may be indistinguishable from acts of war. The Corfu controversy has raised the question of the validity of coercive measures under the Covenant, as we shall note in a later section. But in practice such considerations need not delay effective action by the Council to bring hostilities to an end. M. Briand, in his telegram to the two Governments, does

not state that they have resorted to war, but reminds them of their obligation under the Covenant not to resort to war. This is sound common sense; any resort to force constitutes a menace to peace; it is at least a threat of war, which in Article XI justifies the intervention of the League.

The form of M. Briand's telegram calls for a further remark. The style of the language is that of advice and counsel. He 'exhorts' the two Governments, nevertheless he adds a warning of 'the grave consequences which the Covenant lays down for breaches thereof'. His exhortation rings with a peremptory note. For should the disputants disregard it and continue hostilities, they are in danger of violating the Covenant. Such a warning leaves no practical choice to the disputants. They must either heed it or face the consequences.

In the event nothing could have been more effective. The warning came, in the words of the Rumbold Commission,[1] 'in the nick of time', and saved a town from destruction by Greek gunfire and prevented a general engagement of the opposing armies which would have immediately followed. The Bulgarian Government's response was at once to give orders to its troops not to resist, and this order was obeyed, although the Greek Army was still advancing through delay in the transmission of fresh orders from Athens.

Section 2. WHEN INTERVENTION BY THE PRESIDENT OF THE COUNCIL IS PERMISSIBLE

Such action taken by the President of the Council when war threatens has been formally recognized as desirable in the Report of the Committee of the Council[2] issued in March 1927, on the conservatory measures that might be taken under Article XI, paragraph 1. This report was

[1] See p. 155.

[2] The relevant passage from the Report reads: 'even before the Council meets it is desirable that the Acting President should send telegraphic appeals to the parties to the dispute to refrain forthwith from any hostile acts. The nature of this appeal will necessarily vary with the circumstances of each case.' (See Appendix.)

approved by the 8th Assembly, and the significance of that approval has been authoritatively stated by the Secretary-General, Sir Eric Drummond, at a meeting of the Council. 'In case of an appeal under Article XI of the Covenant,' declared Sir Eric, 'when there was war or threat of war, the President of the Council had definite powers which had been given him in virtue of the decision taken by the Assembly on the proposal of the Committee of the Council.'[1]

It is extremely unlikely that the Council would approve of an independent intervention by the President in the absence of a threat of war, and of an appeal from a State Member under Article XI. This seems evident from the discussions of the Council on the smuggling of arms incident which occurred on January 1, 1928, at the Szent-Gotthard Railway station on the Austro-Hungarian frontier. Austrian officials had discovered an attempt to smuggle machine guns from Italy across Austria into Hungary. The Powers of the Little Entente, acting in accordance with their rights under the Treaty of Trianon, appealed to the Council of the League to set in motion the machinery of investigation provided by the Peace Treaties. In the meantime, Hungary proceeded to destroy, or otherwise get rid of, the incriminating material before a League Commission could arrive on the scene. In these circumstances, the Acting President of the Council, Mr. Cheng-Loh, the Chinese Minister in Paris, prompted by M. Briand, the French Foreign Minister, dispatched to the Secretary-General of the League a telegram which ran: 'Kindly telegraph the Hungarian Government that since the Council has received a request from the Czecho-Slovak, Rumanian and Serbian Governments, I, having learnt from the Press that the Hungarian Government is about to sell the articles to which the request refers, consider that it would be prudent to suspend this action as the matter is shortly to be considered by the Council.'[2]

[1] Council Meeting, Mar. 7, 1928. O. J., Apr. 1928, p. 390.

[2] O. J., Apr. 1928, p. 584.

This action raised doubts in the minds of several Members of the Council. Sir Austen Chamberlain, in particular, declared: 'The President had, on this occasion, in order to secure what help he could on the spot, consulted the Members of the Council who happened to be resident in Paris, where he himself was placed. There was, he thought, a certain inconvenience in that procedure. On another occasion an event might arise when the Acting President found himself in a different capital. In that case, if he followed this precedent, he would consult the other Members of the Council, if any, who happened to be resident in that capital.' Sir Austen Chamberlain was 'inclined to think that it would be better in such cases for the President either to act on his own responsibility or to consult by telegram all the members of the Council, so that all might be upon an equal footing'.[1]

The question was exceedingly delicate, because the Council had been 'seised' of the matter not in accordance with the Articles of the Covenant (before which all Members of the League enjoy equality), but in accordance with the invidious powers conferred on the Council by the Treaties of Versailles, Trianon, and Neuilly, and concerned rights of investigation in regard to armaments in four countries alone, namely, Germany, Austria, Hungary, and Bulgaria. In such matters the Council takes a decision by a majority vote, and acts presumably as the successor of the Allied Supreme Council. Any action taken by it must, therefore, strictly conform to the powers granted by the Treaties in question or by special conventions arising therefrom; it would, of course, be an abuse of the Covenant to use the wide powers of the Council under Article XI to carry out measures deemed necessary by certain of the Allies against their ex-enemies. It was this consideration, no doubt, that inspired the Secretary-General to say to the Council: 'He would remind the Council that, as regarded Article XI of the Covenant, the procedure for conservatory measures had been definitely approved by the

[1] O. J., Apr. 1928, p. 389.

Assembly. Article XI, in his view, was sufficient, and he thought it important that the Council should recognize that fact. Was it now suggested that conservatory measures should be taken apart from Article XI?'

In its June session, 1928, the Council noted its Committee's report on the question, which in effect endorsed the Secretary-General's view. The Report made no specific reference to the admissibility or otherwise of Mr. Cheng-Loh's action. But it definitely re-affirmed the approval of the Council's Report on Article XI of the Covenant mentioned above with its suggestions of the measures which might be taken under paragraph 1 of that Article in case of imminent danger of war. One of these measures, as we have seen, included intervention by the President prior to the meeting of the Council. In regard to other aspects 'namely, the situations which may result from a demand for investigation' (i.e. the case in question), 'or cases where differences have been placed on the agenda in accordance with paragraph 2 of Article XI or other Articles of the Covenant such as Articles XIII or XV, measures for giving effect to arbitral awards (disputes likely to lead to a rupture)', the Committee came to another conclusion. They did not recommend the intervention of the President. The measures thought to be applicable under those circumstances were described in the following resolution recommended to the Council:

'1. The Council considers that, when a question has been submitted for its examination, it is extremely desirable that the Governments concerned should take whatever steps may be necessary or useful to prevent anything occurring in their respective territories which might prejudice the examination or settlement of the question by the Council.

'2. When there is submitted to the Council a request for the investigation of the case of a dispute which has been placed on the agenda under paragraph 2 of Article XI, or other Articles of the Covenant, such as Articles XIII or XV, the Secretary-General shall immediately communicate with the interested parties, drawing their attention to the resolution

(1) above, requesting them in the name of the Council to forward their replies to him without delay for communication to the Council or to inform him of the steps which have been taken.'

The Council did not formally adopt this resolution, but it took note of the Report which contained it.

In view of these opinions expressed at the Council table, it seems clear that Mr. Cheng-Loh's action will scarcely be regarded as a useful precedent. Only in the event of a threat of war may the President intervene before the Council meets, but he will not exercise this initiative unless the dispute has been properly referred to the Council by a State Member in pursuance of Article XI. In the Greco-Bulgar case, the Bulgarian Government first appealed in a telegram to the Secretary-General for the intervention of the League in accordance with Article XI before the President acted.

In the absence of any appeal to the League by either of the disputants who are threatening hostilities, there is nothing to prevent the President in his capacity as representative of his country summoning as a third party an extraordinary meeting of the Council under Article XI, and the dispute being thus properly referred to the Council, he can then, as President, send telegraphed warnings to the disputants.

But in such circumstances the Presidential appeal would hardly be needed, for when a third party—let us suppose the Prime Minister of Great Britain—telegraphs to the Secretary-General and demands a special meeting of the Council in order to take measures to prevent fighting between two Members, the implied warning to the disputants, who would at once be summoned to attend, would surely be equally effective and instantaneous.

Section 3. TELEGRAPHED INTERVENTION OF A THIRD PARTY —INDIRECT WARNING TO DISPUTANTS

The efficacy of such a warning is clearly shown in the action taken by Mr. Lloyd George, the British Prime

Minister, in November 1921, when he dispatched to the Secretary-General his famous telegram convoking a special meeting of the Council to secure the withdrawal of Serb troops, who were advancing into the heart of Albania. It read as follows:

'The continued advance of Serb-Croat-Slovene forces into Albania being of a nature to disturb international peace, His Majesty's Government desire to call the attention of the Council thereto and request that you will take immediate steps to summon a meeting of the Council to consider the situation and to agree upon measures to be taken under Article XVI in the event of the Serb-Croat-Slovene Government refusing or delaying to execute their obligations under the Covenant. The Ambassadors Conference has now decided the frontiers of Albania which will at once be notified to interested parties.'

The Serbs were converging on Tirana from both the north-east and north-west of Albania when Mr. Lloyd George sent his telegram. Its effect was such that there was no need of a direct telegram from the President of the Council to the disputants to request cessation of hostilities and withdrawal of the troops. The Serbian Prime Minister regarded the step taken by the British Government as amounting to an ultimatum which he felt bound to accept. In a note to the Conference of Ambassadors, dated November 14, 1921, M. Pasic, the Serbian Prime Minister, declared:

'The British Government . . . threatens the Royal Government with the application of extreme measures such as those provided for in Article XVI of the Covenant of the League of Nations. By this action a threatening situation has been created resembling that arising out of an ultimatum. Placed in this position the Royal Government states with the greatest regret and under protest that it bows to the decision of the Conference of Ambassadors' (i.e. to accept the frontiers proposed by the latter).

That the warning proved effective is therefore clear on the confession of the Serbian Prime Minister himself. Orders were in fact given for the withdrawal of the Serb troops by M. Pasic before the Council met.

The form of Mr. Lloyd George's message calls for comment. The imperious character of his intervention remains without a parallel in the ten years' history of the League. No other intervention has been coupled with so definite a warning plainly stating that the Council should agree 'upon measures to be taken under Article XVI'. Nor has it since been presumed at once to single out without an investigation by League machinery one of the disputants as the guilty party against whom measures under Article XVI might be contemplated.

When the Council met a few days later (November 17), the representative of Serbia questioned the propriety of the reference to Article XVI in the given circumstances. He held that its application was possible only in the case of a war waged by one of the Members of the League contrary to its engagements.

'It is clear', he continued, 'from the text of this telegram that we were virtually considered guilty of acts which had not taken place, but which it is presumed we might commit in the future. To the best of my knowledge, there is nothing in the Covenant, nor any general legal principle, justifying the laying of an accusation in such circumstances. I do not think that this question can be considered as not affecting the honour and self-respect of the different State Members of the League. I do not think they should be exposed to the risk of finding themselves in the present position of the Serb-Croat-Slovene State, against which it protests with the utmost energy. As regards violations of obligations entered into by the signatories of the Covenant, the necessary threat of punishment is duly provided for, and since they apply equally to all Members of the League, we all accepted them willingly as a necessary guarantee of the loyal fulfilment of the obligations undertaken.'[1]

Mr. H. A. L. Fisher, who represented Great Britain, had evidently felt the doubtfulness of the position. In his opening speech he had declared the reference of the dispute to have been made in accordance with Article XI, and quoted paragraph 2, the most polite form of intervention under the Covenant, by means of which a nation

[1] Procès Verbal. Fifteenth Session Council, Nov. 1921, p. 14.

exercises its friendly right, and he referred to Article XVI in a much milder form. 'It appeared therefore to the British Government', declared Mr. Fisher, 'that it was desirable that the Council should assemble without delay, that it should receive from the two interested parties the required explanations and assurances, and that, should these explanations be unsatisfactory, or these assurances incomplete, the Council should consider what measures should be taken to ensure that the obligations of the Covenant are respected by all the Members of the League.' This was to express the principle in a form applicable to both parties, and when the Serbian delegate persisted in returning to the point in the speech quoted above, Mr. Fisher avoided an explanation and repeated that the British Government was obviously bound by Article XI of the Covenant to draw the attention of the Council to the situation.

Some of the difficulties inherent in the application of Article XVI are implied in the objections put forward by the representative of Yugoslavia. This was the first occasion on which those difficulties were encountered in practice, and it was seen that in order to restore peace Article XI sufficed. Thus even in the early days of the League's history, when emphasis was still on Article XVI and on the belief in the efficacy of punishing the aggressor, the Council had to rely on Article XI, and ignore the reference to Article XVI made by Mr. Lloyd George. On the other hand, M. Briand's telegram to Greece and Bulgaria some years later may be regarded as a recognition of the shifting of that emphasis from Article XVI to XI—in other words, a recognition of the belief in the efficacy of prevention rather than of cure in the business of maintaining the peace of the world.

Conclusion

As the Presidential office is held in rotation, one may question whether the particular member who occupies it at the moment is always the most suitable person to

effect an intervention. It seems an advantage that when hostilities have broken out, as in the Greco-Bulgar case, the acting President should be the Foreign Minister of a Great Power. It is to be hoped that the warning would have been equally effective if the acting President on that occasion happened to be the representative of a small South American State, say Uruguay or Colombia. It may be that this doubt was in the minds of the Committee of the Council when they included in the conservatory measures desirable under Article XI, paragraph 1, the provision which recommended that the Secretary-General be given the following discretion: 'If owing to exceptional circumstances the Secretary-General considered that the acting President was not in a position to act, he might request the ex-President most recently in office who is available to take this step in the name of the Council.' There are, of course, other reasons which call for such discretionary powers; it might well be that the State whose representative was acting as President was itself about to engage in hostilities or was closely interested in a quarrel affecting two other States.

There may be another way out of the difficulty. Mr. Lloyd George's action in 1921 shows that it is not always necessary for a warning to come from the President. It can be given indirectly, though with equal efficacy and at least equal swiftness, by one of the Great Powers (who are members of the Council), who will request by telegram an extraordinary session of the Council. If the acting President happened to be unsuitable, it might be an advantage for a disputant in grave peril to urge one of the Great Powers so to act. In the Yugoslav Albanian case, Albania in fact prompted the British Government to set the League machinery in motion.

II

MEETING OF THE COUNCIL TO RESTORE PEACE

THE expedient discussed in the last chapter, namely the telegraphed warning of the acting President, provides only a first check and necessarily a precarious one. Its effect may not be lasting, and it may not work at all. The whole weight of the Council[1] has to be thrown immediately into the task of separating the combatants.

The Council meets as quickly as is physically possible, in some convenient centre, usually Paris or Brussels, where the Members can be most readily assembled.[2] It may be that the Council is holding one of its ordinary sessions at Geneva when an urgent appeal reaches it,[3] or one is due to take place within a few days; but any delay incurred by waiting for the opening of the regular session may prove dangerous; in the Polish-Lithuanian case,[4] the loss of a fortnight caused in this way was one of the factors which contributed to the Council's failure to control the situation.

On such occasions, when hostilities have broken out or are imminent, the first task of the Council is not to examine the rights and wrongs of the dispute and suggest a solution,

[1] Extraordinary sessions have been held in Paris (Greco-Bulgar case, Oct. 1925; Yugoslav-Albanian dispute, 1921) and one in Brussels (Great Britain and Turkey, Oct. 1924). See p. 24.

[2] In the Greco-Bulgar case, within an hour of Bulgaria's telegraphic appeal to the Secretary-General at Geneva, M. Briand (on Oct. 23, 1925) had sent his warning telegram from Paris to Sofia and Athens, and telephoned Sir Eric Drummond to summon a special meeting of the Council to meet two days later in Paris, on Monday, Oct. 26, at 4.30 p.m. Sir Austen Chamberlain and M. Hymans (Belgium) had ample time to arrive from London and Brussels, but the Swedish member, M. Unden, came by aeroplane from Stockholm. The other States members of the Council were represented by their accredited Ministers in Paris.

[3] See Corfu case, p. 75.

[4] See p. 92.

but to implement the acting President's prior intervention and to take other measures to end or ward off hostilities. This clear separation of its twofold task—(*a*) maintaining a provisional peace, (*b*) removing the causes of the dispute—was first fully realized and carried out in the Greco-Bulgar case in 1925. At the opening meeting of the Council (October 25, 1925), M. Briand, the President, had no doubt as to his first duty: 'Two distinct questions arise', he declared; 'sufficient time must be allowed and care must be taken in dealing with the first question, which involves ascertaining the facts and responsibility, and if necessary fixing the amount of reparations due, but the other question is urgent, as it concerns the cessation of hostilities and the immediate withdrawal of the Bulgarian and Greek troops to their respective territories . . . I propose that the Council should hear the representatives of Greece and Bulgaria on the following points. What action is being taken on the recommendation of the acting President of the Council with regard to the cessation of hostilities and the withdrawal of troops and what is the present situation.'

To keep the issues separate is really of first importance. When the discussion is narrowed down to the clear and single aim of breaking off hostilities, the task of the Council is simplified; it is to confront the disputants with their plain duty under the Covenant to co-operate in executing measures to restore peace; if they refuse, they do so in the knowledge that the Council may take action against the violators of the Covenant.

In the Greco-Bulgar case, the Council seemed to be fully aware of the political authority it would exercise in following this method. The representatives of Greece and Bulgaria (invited for the purposes of the dispute to be Members of the Council) were given little opportunity of discussion. They were asked to give categorical replies to perfectly simple questions. When the Bulgarian representative in his reply began by a recital of the origin of the quarrel, he was interrupted by M. Briand, who declared

that a statement about the facts would come at a later stage. 'The Council is asking Greece and Bulgaria to reply to a simple question', repeated M. Briand, 'the Greek and Bulgarian Governments have been invited before anything further is done to cease hostilities and to withdraw their troops behind their respective frontiers. I wish to know what response this invitation has received.'

Section I. THE EXERCISE OF DICTATORIAL INTERFERENCE —INTERVENTION

It became evident that the Council was not satisfied that hostilities had ceased or that evacuation was proceeding satisfactorily, and it proceeded, still acting under Article XI, to secure compliance with its demands.

The Council went into private session and appointed Sir Austen Chamberlain Rapporteur. The representatives of Greece and Bulgaria were invited to withdraw to enable the Members of the Council to have a private exchange of views. The request was complied with, although it could well have been refused, as, in accordance with Article IV, paragraph 5, of the Covenant, the disputants are entitled to be present when their case is discussed. On the other hand, the meeting of the Council might have been regarded as suspended, the Members coming together in a private capacity. This device might be read into the careful wording of the Minutes. 'The Members of the Council, after an exchange of views, subsequently invited the representatives of Greece and Bulgaria to return to a private meeting of the Council.' This incident emphasizes the political nature of the Council's activities under Article XI, paragraph 1, and the representatives of the disputants must have been given cause for reflection in the fact that the Members of the Council were discussing in their absence the appropriate measures that might have to be taken against them. On returning to the private meeting of the Council, the two representatives were informed that the Council had decided to repeat in the most categorical

manner, at a public meeting, a request to the effect that hostilities should cease at once; to this procedure the disputants agreed and the doors of the Council room were thrown open to the public.

Sir Austen Chamberlain, in presenting the resolution of the Council (which had been approved at the private meeting), declared in firm language that it would be an 'affront to civilization if, with all the machinery of the League at their disposal and with the good offices of the Council immediately available, as that meeting showed, such incidents should now lead to warlike operations instead of being submitted at once for peaceful and amicable adjustment by the countries concerned to the Council.'

He then read his Resolution.

First came the approval of the acting President's action:

'The Council has approved the initiative taken by its acting President in reminding the Bulgarian and Greek Governments of the solemn obligations undertaken by them as Members of the League of Nations under Article XII of the Covenant not to resort to war, and the grave consequences which the Covenant lays down for breaches thereof, and exhorting them, therefore, to give immediate instructions that pending the consideration of the dispute by the Council, not only no further military commitments should be undertaken, but that all troops should at once be withdrawn behind their respective frontiers.'

Then the insistence on the separation of the functions of the Council, and the duties of the disputants:

'The Council has inquired of the two parties as to whether these two conditions have been fulfilled, as it considers them to be of vital importance and an essential preliminary to any subsequent action by the Council on any other aspects of the dispute.'

Then follows the stern request:

'The Council is not satisfied that military operations have ceased and that the troops have been withdrawn behind the national frontiers.

'It therefore requests the representatives of the two States to inform it within 24 hours that the Bulgarian and Greek Govern-

ments have given unconditional orders to their troops to withdraw behind their respective national frontiers, and within 60 hours that all troops have been withdrawn within the national frontiers: that all hostilities have ceased and that all troops have been warned that the resumption of firing will be visited with severe punishments.

'The representatives of the two Governments are requested to arrange that instructions shall be immediately given to ensure the execution of these measures by the dates fixed for them.' Finally they were requested to accord facilities to officers appointed by the Council (see p. 103) to supervise the execution of these measures.

It should be noted that, although the Council was not satisfied that hostilities had ceased, there was no question of accusing either of the parties of persistent violation of the Covenant and of considering the application of Article XVI. Even in such a comparatively simple case as was then presented, when it was generally known that Greek forces were in large numbers [1] invading Bulgaria, such a charge could not be made without an investigation on the spot, such as was afterwards undertaken by the Rumbold Commission. That would have required time, and there was no time to spare when the task was immediately to bring hostilities to an end.

The wide competence enjoyed by the Council under Article XI enabled it to act without its being first obliged to establish facts or prove charges, as it would be forced to do were it a question of applying Article XVI. Its primary task being to separate the combatants, it addressed itself to both disputants, as if each were equally at fault.

This example gives further emphasis to the comment made earlier [2] to the effect that when it is a question of ending hostilities, the need for a ready-made definition of an aggressor—which has aroused so much controversy at conferences on 'security and arbitration'—does not necessarily arise.

The tone of the Council's resolution is far more imperious than the President saw fit to employ in his

[1] See p. 157. [2] See p. 37.

telegram. In form, with its precise time limits, it is scarcely distinguishable from an ultimatum. The Council does not persuasively appeal to the disputants, or recommend that they adopt, if they see fit, a certain course of action, as was done in the case of the Polish-Lithuanian dispute. The resolution in the latter case, which was drawn up by M. Hymans in consultation with the two disputants, puts the emphasis on the conditional consent of the two parties; for example, it states that the 'Council offers to the Polish and Lithuanian Governments, in the event of their accepting the present provisional arrangement, to appoint a Commission on the spot': [1] both in style and in matter this was a recommendation in the strict sense. But to the Greeks and Bulgars the Council addressed a plain demand to take certain steps within twenty-four hours, a demand which certainly proved far more effective than the persuasive appeal to the Poles and Lithuanians.

Greece and Bulgaria, confronted by the request of the Council, complied with alacrity with what they termed the 'decision' of the Council.

It is important to give here a textual quotation from the Minutes.

'The President asked the representative of Bulgaria whether he had any objections to raise. M. Morfoff said he was authorized to declare that his Government was ready to comply unconditionally with the decision of the Council which had just been communicated.

'The President asked the representative of Greece the same question.

'M. Carapanos said he had no objection to bring forward. He would be bound to forward the terms of the decision of the Council to his Government, which would, he was convinced, comply with them.

'The report was put to the vote and adopted.'

As if further to bind the Greeks and Bulgarians to observe the authoritative decision of the Council, both Sir Austen Chamberlain and M. Briand emphasized that

[1] See p. 72.

the time limit of twenty-four hours fixed in the report was to run from the present meeting. M. Briand said in addition: 'It is not sufficient for the troops to be withdrawn across the frontier; it is essential that from this frontier there shall be no firing either with rifles or with guns, which means that the troops withdrawn across the frontier must cease all acts of hostility. The text of the report presented by the representative of the British Empire will be telegraphed this evening to the Governments concerned.'

One should note the firmness with which the Foreign Ministers of France and Great Britain insisted on securing the approval of the disputants for the measures thought necessary by the Council. The peremptory request [1] addressed to the parties by the Council acting under Article XI, is without a parallel in the history of the League and furnishes a very valuable precedent, and this is important, because as M. Rutgers, the Rapporteur on the Security Sub-Committee of the League, declared in his memorandum on Article XI, 'The Council will to a great extent be guided by precedent, and its experience will grow with the progress of the work'. Indeed, before the Council rose from its Extraordinary Session, Sir Austen Chamberlain was moved to declare that they were making a useful contribution to the 'jurisprudence of the League'.

An interesting opinion on the Council's action in this case is given by Dr. MacNair in his edition of Oppenheim's *International Law*. The Council's action was intervention in the strict sense understood in international law. According to Oppenheim, intervention consists in 'the dictatorial interference of a third State in a difference between two States, for the purpose of settling the difference in the way demanded by the intervening State'. 'Intervention in a difference between two States takes the form of a communication to one or both

[1] The measures taken by the Council to supervise the withdrawal of the troops were equally peremptory and are described on p. 102.

of the conflicting States with a dictatorial request for the settlement of the conflict in a certain way. If, however, one or both parties fail to comply, the intervention will be abandoned, or action more stringent than a mere request, such as pacific blockade, military occupation, and the like will be taken.' With these definitions before him, Dr. MacNair states that 'intervention seems to be the correct term to apply to the action of the League in preventing an imminent outbreak of war between Greece and Bulgaria'.

Section 2. THE FORCE OF DECISIONS WHICH MAY BE TAKEN UNDER ARTICLE XI, PARAGRAPH I—A PRACTICAL TEST OF AGGRESSION

The Council's demand, amounting, as we have seen in the first section, to a 'dictatorial request', is interesting in so far as, in accordance with Article V, paragraph 1, of the Covenant, a decision of the Council requires the unanimous consent of all the members of the Council, and the latter would include the parties, in accordance with Article IV, paragraph 5, of the Covenant which enables them to sit as Members of the Council, as every Member is entitled to do 'during the consideration of matters specially affecting the interests of that Member of the League'.

We assume that the conditions under which unanimity is not required are not here applicable, namely, those occasions upon which the Council has to deal with questions of procedure, when a majority suffices.

For a decision taken under Article XI, are we then confronted by the requirement of securing the unanimity of all the Members of the Council including the disputants? In our examination of the action of the Council in the Greco-Bulgar case, we established the fact that its recommendation took the form of a 'dictatorial request' to the disputants. If we are going to apply the principle of absolute unanimity to this case, we shall be faced with

an absurdity; it would be equivalent to stating that the Council cannot request a Member to stop fighting—for its resolution took that form—without the Member consenting that the request be made to it. Obviously the disputants were asked to *comply* with the request; both representatives referred to the decision as something taken apart from themselves with which they promised to comply.

The nature of the action which can be taken under Article XI should not be misunderstood. When the Council meets under Article XI to deal with a threatened or actual outbreak of hostilities, the important question is: how far can the Council bring its political influence to bear on the disputants so as to secure their consent to measures it considers necessary for the restoration of peace. At such a grave moment, the Council is something more than a mediating Committee; it is a conference of Powers whose duty it is to take steps or to initiate conservatory measures to restore peace. An indication of the character of such conservatory measures permissible under Article XI is given in the Report of the Committee of the Council, to which reference was made in the last Chapter.[1] This Report, authorized unanimously by the 8th Assembly, recommended that in the event of an imminent threat of war, and if the State in default persisted in its warlike preparations or action, the Council should undertake measures which included naval or air demonstrations. Now the first step is to request the cessation of hostilities, as mentioned in the Report. Such a request may be regarded as the first of a series of political acts, undertaken by the Council, the last of which might be measures of a coercive kind aimed against the disputants if that request were not complied with.

Obviously such acts are not conditioned by the consent of the disputants, and in voting for the resolution which formulated the request in the Greco-Bulgar case, the

[1] This Report has obtained 'the full agreement of His Britannic Majesty's Government'. C. A. S. 10, Feb. 1928, p. 56. See Appendix III.

representatives of the parties were registering the fact that they were complying with the request.

In Mr. Rutger's memorandum on Article XI, approved by the 9th Assembly (A. 20, p. 54), it is stated that Article XI 'does not impose upon Members of the League any obligations which can be rigidly specified: the Council's action under this Article is political rather than judicial' (C. A. S. 10, p. 28). This opinion confirms the foregoing argument.

In the sessions of the Committee on Security and Arbitration, when consideration was given to the German proposal empowering the Council to impose an armistice (see next Section), the Members seemed to accept as a matter of course that a decision to intervene under Article XI could be taken by a unanimous vote exclusive of the disputants. The only doubtful question was whether the decision needed a majority vote or a unanimous vote exclusive of the disputants. The Committee decided unanimously on the latter principle.[1]

The question can be approached from another angle, and those who attach importance to legal forms may take comfort in the Report of the Committee of the Council on Article XI,[2] where it states that the 'procedure to be instituted under Article XI in no way implies the exclusion of procedure taken under other provisions of

[1] Third Session, Committee on Security and Arbitration, 1928, p. 38. The question in discussion was put by the Rapporteur, M. Rolin-Jaquemyns, as follows: 'Should the Council's resolutions . . . be adopted unanimously (*not counting of course the votes of the representatives of the Parties to the dispute*) or would a majority vote, simple or qualified, be admissible' (italics mine). The Canadian delegate, in approving the view that the decision required unanimity (not counting the disputants), said: 'The principle of unanimity is a cherished one in our Canadian constitutional development. It has long been recognized as fundamental in the relations between the various members of the British Commonwealth. I am very pleased we are going to stand firm on this question of unanimity. The successful intervention of the Council, once hostilities have broken out, must be backed by world opinion, which is much more easily obtained if the Council is unanimous.'

[2] See Appendix.

the Covenant'. It quotes the precedent of the Aalands Islands dispute[1] in order to suggest that Article XV could also be applied, 'thus if any action contemplated by the Council as being calculated to preserve peace is taken under the provisions of Article XV, the votes of the representatives of the parties will not count for purposes of unanimity as far as such action is concerned.'

Some such device is very necessary if we believe that the Council cannot take a decision under Article XI without the consent of the disputants; for if this belief is correct, the Council is under a greater disability when it meets under the imminent threat of war than when it proposes a settlement under less menacing conditions. For Article XV, paragraphs 4 and 6, gives the Council the right to make a recommendation provided it 'is unanimously agreed to by the Members thereof other than the representatives of one or more of the parties to the dispute'.

To apply Article XV would accordingly remove the juridical difficulty caused by the dissentient vote of one of the parties when the Council has to take a decision under Article XI in order to safeguard peace. But the removal of the juridical difficulty is of little practical importance. It may satisfy legal purists. The Council would still be confronted by its main task, namely, to bring its influence to bear on the disputants to secure their compliance with its decision, as a recommendation under Article XV is not binding on the parties.

The influence of the Council is, however, more readily exercised under the conditions of paragraph 1, Article XI. The resolution of the Council formulating a request to cease fire cannot be ignored by a disputant without incurring grave risks, whereas a recommendation under Article XV, for example, proposing a final settlement has frequently been refused by one of the parties, as will be shown in a later chapter,[2] the Council invariably respecting the refusal.

In the Greco-Bulgar case, if Greece refused to approve

[1] See p. 126.

[2] See p. 185, Optants case.

the Council's resolution to cease fire, she would be admitting to the world that she was continuing hostilities in defiance of her obligations under Article XII. of the Covenant not to resort to war. Greece, in such circumstances, would be deliberately inviting the Council to consider what further measures might be taken under Article XI to safeguard peace.

If we suppose, on the other hand, that Bulgaria, whose territory was invaded, refused to cease hostilities until the Greeks had withdrawn behind their national frontier, are we to assume that this refusal would incur similar risks of conservatory action by the Council, and aimed against a Member who might make the plea that he was exercising the elementary right of self-defence? If we read the resolution of the Council,[1] we shall clearly see that both parties were expected immediately to cease hostilities, whatever the disposition of the troops on either side. The two Governments were requested to warn the troops that any resumption of firing would be visited with severe punishments, and the two Governments, as we have taken great care to show, were treated on an equal footing. The British and French Military Attachés on the spot (see p. 104) saw that the two parties carried out the decision of the Council to cease fire immediately. If Bulgaria alone disobeyed and continued hostilities after the Council's decision, she would undoubtedly have had to make reparation to Greece for any loss of life that would have been caused by her deliberate action.

The Council decided what measures were permissible in order to free Bulgarian territory of the invader, and Bulgaria could not on the plea of self-defence make war on Greece. A very valuable precedent was thus established. If a State Member finds his territory suddenly invaded, he may resort to arms to defend himself, but he should not continue hostilities without at once appealing for the League's intervention, and the Council will at once endeavour to take control of the situation.

[1] See p. 50.

Defining the aggressor 'without a definition'

The powers of the Council revealed by this incident are indeed of the greatest promise. For the Council, by its request to cease fire, erects what Professor Shotwell cleverly calls 'a juristic frontier alongside the geographic one . . ., and it is the juristic frontier alone which furnishes an adequate test of aggression and legitimate defence'. For, 'if either one (Greeks or Bulgars)', writes Professor Shotwell, 'had gone on with the hostilities when the Council of the League presented the alternative, and forced the choice, then it would have been the aggressor'. Thus the machinery of the Council enables 'war to be defined without definition'; without, in other words, attempting the impossible task of drawing up a formula to fit all the conditions and circumstances which might arise in the future, the Council in action provides the means for determining each issue as it arises.[1]

In inducing the parties to accept its decision taken under Article XI, paragraph I, the Council has as potent a weapon in the force of public opinion as in the fear of possible conservatory measures. Indeed, it is difficult to conceive of a more effective 'sanction' than the sudden focussing of world opinion on a meeting of the Council of the Nations specially convoked to deal with two possible disturbers of the peace. In the Greco-Bulgar case the Council deliberately chose to repeat in a public session the resolution which it had adopted in a private meeting. The same insistence on taking a decision in public was shown in the Yugoslav-Albanian dispute, when the Serbs were asked to withdraw from Albania.[2]

Some Members of the League have felt dissatisfied with the position of the Council on such occasions. Germany, in particular, has sought at meetings of the Committee on Security and Arbitration to win acceptance for

[1] *War as an Instrument of National Policy*, by J. T. Shotwell, p. 207.

[2] See p. 114.

its view that the Council's decision, taken in accordance with Article XI, paragraph 1, to end hostilities should be legally binding on the disputants. This and cognate questions are considered in the next section (3).

Section 3. CIRCUMSTANCES IN WHICH DECISIONS UNDER ARTICLE XI ARE BINDING ON THE PARTIES IN VIRTUE OF (*a*) MODEL TREATY, OR (*b*) LOCARNO TREATY

In the previous section it has been shown that the Council may take a decision under Article XI, paragraph 1, proposing the cessation of hostilities, by a unanimous vote exclusive of the votes of the parties. Although such a decision is not, under the Covenant, legally binding upon the parties, the authority and prestige of the Council, the measures in reserve with which it may compel execution, and the force of public opinion make that decision well-nigh irresistible. But, as stated previously, some members of the League desire to go farther and transform that decision into an obligation legally binding on the parties.

(*a*) *Model Treaty*

At the second session of the Committee on Security and Arbitration, Germany proposed that the members of the League 'should undertake in advance to accept, on the Council's proposal, an armistice on land, sea, and air, including especially the obligation of the two parties in dispute to withdraw the forces which might have penetrated into foreign territory, and to secure the respect of the sovereignty of the other State'.

The use of the word 'armistice' presents difficulties. It may give rise to subsidiary questions the manner of the settlement of which had better be governed by the particular circumstances of the moment, *after* hostilities have ceased. As Lord Cushendun declared, 'What we want to do at the moment when a dispute in its early stages has gone over the border-line between peace and war is to bring about a cessation of hostilities on both sides in order that the machinery of the League may have time and

opportunity to play. We should have the 'cease fire'. If we confine ourselves to that language, we escape the complicated question which might arise from the word "armistice" and which would very likely delay the work of the Council.' [1]

Lord Cushendun thereupon made a valuable contribution in proposing a clause which, with very little modification, found its way into the 'Model Treaty to Strengthen the Means of Preventing War', adopted by the 9th Assembly (1928): The signatories to this Treaty undertake in Clause 3 'to comply with the recommendations which the Council may make to them for the cessation of hostilities, prescribing in particular the withdrawal of the forces having penetrated into the territory of another State, or into a zone demilitarized by international treaties, and in general, inviting them to respect each other's sovereignty and any obligations assumed in regard to demilitarized zones'.

This provision is surely comprehensive enough to satisfy the most exacting member, and Clause 4 strengthens it in obliging the parties 'to lend themselves to any action' decided upon by the Council to carry out the measures (of Clause 3) designed to end hostilities. The Model Treaty also lays down the requirement of a unanimous decision, the votes of the parties not being counted. 'In the cases referred to in Articles III and IV, the High Contracting Parties undertake to act in accordance with the recommendations of the Council, provided that they are concurred in by all the members other than the representatives of the parties which have engaged in hostilities.'

It is perhaps regrettable that these useful provisions, the most important of which was contributed by the representatives of Great Britain, were not made the subject of a Special Convention, which all the members of the League would be invited to sign, rather than a Model Treaty left to the initiative of each member to

[1] Minutes, 3rd Session, Committee on Security and Arbitration, p. 37.

transform into an actual one. However, there it stands, a signpost of what the members of the League regard as desirable, though not as necessary. The representatives of Great Britain, for example, did not believe that the legal obligation to obey the Council on such occasions would make much difference in the case of a disputant anxious to go to war—prepared, in other words, in view of Article XII of the Covenant, to commit the greatest illegality of all—they clearly felt that the Council's political influence was the deciding factor at such times.

Obviously, when two small States are faced with a peremptory decision of the Council, the great Powers at the Council table have only to exercise a little firmness in order to secure their compliance.

(*b*) *Locarno Treaty*

In the case of a quarrel between two great Powers, the position is not so certain, and one possibly needs every treaty safeguard that can be devised. It is satisfactory to note that four of the great European Powers, Great Britain, France, Germany, and Italy, have undertaken in the Locarno Treaty—should hostilities break out in breach of the Treaty and all the signatories are engaged in them—to comply with the recommendation which the Council may make as soon as it takes control of the situation, the votes of the parties not being counted in reckoning unanimity. Thus the decision of the Council, acting under Article XI, in virtue of the Locarno Treaty, is binding on all the disputants, whether they approve the decision by an affirmative vote or not.

One may say in conclusion that the influence of these provisions of the Locarno Treaty and of the principles expressed in the Model Treaty and approved by the 9th Assembly, must greatly strengthen the force of the Council's decision, taken under Article XI, in cases where the legal obligation to comply with the decision has not been created.

Section 4. COUNCIL'S OVERRIDING COMPETENCE UNDER ARTICLE XI, PARAGRAPH 1

We have observed how the Council has been able to make a dictatorial request to the disputants at a moment when it was exclusively concerned with separating the combatants, the final settlement being deferred to a later stage when the mediatory principles of Art. XV would become operative; the advantage of maintaining a clear distinction between the various stages of a dispute was thus made manifest. The importance of rigidly observing the distinction between the duties of restoring peace and proposing a final settlement derives another significance when we examine an earlier dispute, namely, that between Albania and Yugoslavia in 1921. The conduct of this case shows that differentiation of function should give another advantage to the Council—it should enable it to be 'seised' of a dispute in its initial stages (during which hostilities have to be suspended) even although the substance of the dispute is being settled by some other authority. Failure to make this separation of duties led to rather unfortunate results in the handling of the trouble in its early period. Albania, fearing that her integrity was menaced by Serb and Greek troops within her territory (the frontiers were yet to be fixed by the Ambassadors' Conference[1]), appealed to the League in pursuance of

[1] Albania was in the unusual position of having been accepted a Member of the League before her frontiers were fixed. The Great War had prevented the delimitation of the boundaries proposed by the London Conference in 1913. At the end of the War of 1914–18, most of the territory regarded as Albanian by the London Conference was in Albanian hands, but a section in the north and north-east had been taken over by the Serbs occupying the armistice line vacated by the French and Italians, whilst the Greeks occupied a section in the south—the district of Koritza—pending the final fixing of the boundaries. The fixing of the frontiers was one of the tasks left over by the Treaty of Trianon to the Ambassadors' Conference, which delayed unduly in dealing with the matter. The delay was such indeed as to encourage Albania's neighbours to strive for more territory and present the Ambassadors with fresh facts. There were frequent local conflicts between the Albanians and Serbs, and Greeks.

Article XI, in June 1921. But in laying his case before the Council the Albanian representative was not very adroit. He made a composite demand to the effect that the Council should at once proceed to fix the boundaries of Albania (though this was the task of the Ambassadors' Conference) and at the same time send out a Commission of Inquiry to investigate conditions and to take measures to prevent disturbances. The ensuing discussion was equally confused. The Greek and Serb representatives were not slow to seize their advantage and claim that the Ambassadors' Conference was alone competent to fix the frontiers. They made long historical and juridical argument to support their case, and also to justify their presence in the territory in question.

The Council made no attempt to disentangle the issues. Its overriding duty under Article XI was to propose measures to keep the peace, to make some provisional arrangement, such as zones of demarcation to prevent contact between the rival troops, until the substance of the dispute had been disposed of. Albania's claims should have been narrowed down to that single issue. There the Albanian representative would have been on sure ground, and could have pointed to the precedent of the Polish-Lithuanian case in which provisional zones dividing the troops were laid down by a League Commission pending a final settlement of the frontier question. It is doubtful whether in those early days the peculiar significance of each of the dispute Articles of the Covenant was appreciated. The Albanian representative, for example, laid 'special stress on the importance of the first paragraph of Article XV', rather than, as he should have done, on Article XI, paragraph 1.[1] That is precisely the

[1] M. Fan Noli, the representative of Albania, requested the Council 'to cause the provisions of Articles XI, XII, XIII, and XV of the Covenant of the League to be respected. We venture to lay special stress on the importance of the first paragraph of Article XV, according to which it is sufficient, in case of a dispute between Members of the League, that one of the parties should inform the Council in order to enable the latter to take steps for a thorough inquiry and investigation.' O. J. Sept. 1921, p. 728.

clause which restricts the competence of the Council to disputes which are not already being settled by other bodies, as will be explained in a later Chapter. After a discussion destitute of conscious direction and ranging over so many issues, it is not to be wondered at that the Council finally decided that the Ambassadors' Conference was the appropriate body to settle the dispute, and contented itself with expressing a pious hope that the disputants would preserve the peace until a settlement was reached.

Albania, very wroth, appealed over the head of the Council to the Assembly, as a Member is entitled to do in accordance with paragraphs 9 and 10 of Article XV. The latter body was to meet three months later, in September, but by August events had moved so rapidly that Albania was compelled once again to appeal for the intervention of the Council in accordance with Article XI. In a communication to the Secretary-General, dated August 6, 1921, the Albanian delegation at Geneva referred to the attempt made by the Serbs to set up a republic in northern Albania and to a clash between Serbian comitadjis and Albanian troops, and ended with the following words:

'Basing my appeal on Article XI of the Covenant, I request that you will communicate this memorandum to the Members of the Council so that immediate steps may be taken to avoid further bloodshed and to safeguard the maintenance of peace which is now so seriously threatened.'[1]

Things had been going from bad to worse, the armistice line[2] maintained by Serbia was proving to be extremely elastic, and Albanian integrity was gravely threatened by the attempt made, with the direct connivance of the Serbs as was later established by a League Commission, to set up a bogus republic in northern Albania. The facts were grave enough to warrant an immediate inquiry in the troubled area with a view to making provisional arrangements for safeguarding peace

[1] O. J., Oct. 1921, p. 883. [2] See footnote, p. 63.

Albania's appeal came before the Council at its September meeting, a month later, and was rather summarily disposed of by Mr. Balfour, who remarked that, as Albania had in the meantime referred the whole question of the frontier to the Assembly, the latter was the appropriate body to look to for protection.

The report of the rapporteur, Mr. Balfour, adopted by the Council, read:

'. . . The result of these two procedures (on the part of the Albanian delegation) is that the Assembly has been requested by Albania to deal with the determination of the Albanian frontiers, and the Council has been asked to prevent those frontiers being violated by the action of the Serbs. The two subjects are evidently intimately connected, and it seems absurd to send one of them to the Assembly and the other to the Council. I suggest, therefore, that as the Assembly has been requested by the Albanians to deal with the determination of the frontiers, that they should also be asked to deal with the violation of the frontiers.'

This decision reflected no credit on the Council. The principle of indissolubly linking the substance of a dispute with temporary measures to prevent disturbances pending the settlement of a dispute was a new one; neither justified by the Council's previous action (Polish-Lithuanian case) nor followed in its subsequent practice (e. g. Greco-Bulgar case). Indeed, the Assembly itself, which was then about to meet, did not endorse the action of the Council. It passed a resolution, as we shall see, asking the Council to appoint a Commission which would proceed immediately to Albania, whether the Conference of Ambassadors had completed their task or not.

The debates at the Assembly revealed very strong views. The sympathy of the delegates was almost entirely with Albania, and it was apparent that the general opinion was opposed to the attitude of the Council in refusing to deal with the immediate question of preventing disturbances. Lord Robert Cecil, who then represented South Africa, pleaded very eloquently against delay. The

battle raged over the question whether the Commission of Inquiry could be sent before or after the decision of the Ambassadors. Even in the Assembly, the distinction between safeguarding peace and investigating questions relating to the substance of the dispute was not clearly made. Lord Cecil had the clearest view of the position in the following passage: 'It is evident', he declared, 'that you may have fighting, even in a district where no frontiers are fixed. There are many States, original members of this League, whose frontiers are not in all respects fixed, but who would certainly resent the idea that this League had no concern with disturbances occurring in the territories where the frontiers were not fixed, if they were really threatening the peace of the world. Therefore, the fact that the frontiers are not fixed is not quite conclusive. *It is conclusive as to the other parts of the duties of the Commission*, but not as to this part.'

By the 'other parts' Lord Cecil meant those duties of the Commission which related to reporting on the execution of the Ambassadors' decision on the boundary question, and by 'this part' he was alluding to the Commission's duties to prevent disturbances. He was thus declaring the overriding competence of the League to take action when peace was threatened, whatever body was in charge of the original dispute. He also declared: 'If there is to be a long delay of weeks, or perhaps months, before this question is settled, then I do think the Commission should go before the settlement is arrived at' (2nd Assembly, p. 662, 1921).

His task would have been easier if the proposed Commission's duties had been rigidly confined to taking measures to prevent disturbances, pending a final settlement by the Ambassadors' Conference. He, however, carried his main point, namely, that the Commission should proceed immediately to Albania. The Assembly agreed to request the Council,

'forthwith to appoint a small Commission of three impartial persons to proceed immediately to Albania and report fully on the execu-

tion of the decision of the Principal Allied and Associated Powers as soon as it is given, and on any disturbances which may occur on or near the frontiers of Albania'.

The Council, at its meeting of October 6, proceeded to comply with the Assembly's request. Mr. Balfour, as Rapporteur, proposed the appointment of a Commission of three. 'The Council', he declared, 'in its great anxiety to see peace preserved, and feeling assured that the decision of the Principal Allied and Associated Powers will be taken without delay, considers that the Commission should arrive in Albania by November 1, 1921.' The Marquis Imperiali, representative of Italy, objected, contending that the Assembly had decided that no action be taken by the Commission until the Ambassadors' Conference had decided the frontiers. This view was not supported by Mr. Balfour. 'If the Council', he declared, 'refused to carry out the undoubted wish of the Assembly with regard to a date because it foresaw . . . another month's delay in the settlement by the Allied Powers of the frontiers of Albania . . . the Council would find an extremely bitter feeling would be aroused in all those who belonged to the League of Nations. . . . He was quite sure that the Council would make a great mistake if the Assembly could say that, in interpreting its wishes, it had weakened their expression.'

The date was accordingly retained, but, to please Italy, an extraordinary concession was made to the effect that the Commission 'should take no action until the decision of the Principal Allied and Associated Powers be given'. They were to proceed to Albania by November 1, but they were to do little to keep the peace, pending the final settlement of the dispute by another body.

Encouraged no doubt by this display of weakness and hesitation, the Serbs, throwing off all disguise, invaded Albania from the north-east and north-west, and converged towards Tirana, and, according to the evidence of the British Consul (quoted by Mr. Fisher at the Extraordinary Session of the Council on Nov. 17), spread

ruin and devastation as they advanced. It was this invasion that caused Mr. Lloyd George to send his famous telegram, convoking a special meeting of the Council, to which reference was made in the last chapter. But even Mr. Lloyd George, as the words of his telegram show (see p. 43), did not intervene before he had been told that the Ambassadors' Conference had reached a decision as to the frontiers.

As we have already observed in the first chapter, at the Extraordinary Session, the Council applied itself vigorously to restore peace and evacuate the invaders, a task which it accomplished successfully.[1] Here it is sufficient to emphasize that if the Council had acted earlier in response to Albania's appeal in June, or, if the facts at that time were not so menacing as to justify intervention, at least in September, when they were sufficiently grave, the Council would in so doing have averted the invasion, and prevention is better than cure, particularly where the disease is invasion causing loss of life.

The hesitation to intervene earlier in the dispute was probably due to the fact that the Council had not clearly separated the issues placed before it; the question of maintaining a provisional peace on the one hand, and the question of the frontiers on the other. Had this been done, the Council would have acted more efficiently and shown in its conduct a more ready approval of the principle of its overriding competence under Article XI when war threatens, even although the substance of the dispute is being dealt with by some other body. In the resolution of the Assembly we have, however, a tacit recognition of the principle which the Council by its decision of October 6 endeavoured to apply.

In a later chapter,[2] which deals with the general question of the competence of the Council, it will be seen that progress, both in theory and in practice, is shown in a fuller appreciation of the principle. 'Even if a dispute', reads a Report on Article XI (Rutgers) approved by the

[1] See p. 44.

[2] Chapter V, Part III.

9th Assembly, 'is submitted to a special tribunal, it is possible in certain cases that such tension may develop between two States as to amount to a threat of war. The Council can then intervene under Article XI. This is explicitly recognized in the Locarno agreements, when it is stated that nothing in the agreements is to be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world.' [1]

Section 5. THE EXERCISE OF MEDIATION

Circumstances do not always call for decisions which amount to dictatorial requests when the Council meets for the specific purpose of restoring or maintaining peace. The decisions of the Council may take a more persuasive form, of which an example is provided by the dispute between Great Britain and Turkey in 1924 concerning the Mosul vilayet.

The question of the attribution of the Mosul vilayet was referred to the Council in pursuance of the Treaty of Lausanne, in September 1924, and the Council immediately proceeded to appoint a Commission of Inquiry to examine the problem in Iraq. It omitted as a preliminary step to propose any means of maintaining the *status quo* and preventing hostile incidents between the British and Turkish troops in the north of the province. The Council in the last paragraph of its resolution reminded the parties of their undertaking in accordance with Article 3 of the Treaty of Lausanne to the effect that [2] 'pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision'.

The duty of maintaining peace was left to the unaided efforts of the disputants themselves. The Council had not been seised of the dispute under Article XI under a threat

[1] Preparatory Commission for Disarmament Conference, C. A. S. 10, p. 29.

[2] O. J., Sept. 30, 1924.

of war: it was acting as an arbitral body in pursuance of a special Treaty to settle a boundary problem. It may, therefore, be excused for not first proceeding to take measures to prevent hostile incidents before dealing with the substance of the dispute.

With such a task it was soon, however, to be faced, for a movement of Turkish troops within territory claimed by the British, but denied by the Turks, to be under their provisional rule, caused the British Government, through its Chargé d'Affaires in Constantinople, to send an ultimatum[1] to Turkey. Meanwhile the British Government had informed the Council on October 14, 1924, that a dispute had arisen with the Turkish Government over the interpretation of the last paragraph of the Council's resolution regarding the maintenance of the *status quo*. At the British Government's request, a special meeting of the Council was convoked to meet in Brussels on October 27, in accordance with Article XI. The Turkish Government[2] had also appealed to the League in view of the ultimatum and proposed the submission of the question of the *status quo* to the Council.

When the Council duly met in Brussels, on October 27, it became clear that the trouble had been caused by the fact that the parties had different ideas as to the exact area they were entitled to administer until the final decision was reached by the Council, and as both disputants were anxious to arrive at a provisional agreement, there was no occasion for the Council to intervene in a peremptory fashion. It acted strictly as a mediator; the Rapporteur, M. Branting, after a private discussion with both parties, traced a line, subsequently called the Brussels line, with the help of expert cartographers, which was a compromise between the British and the Turkish idea of the *status quo*, and, having secured their approval, he announced the agreement to the Council, which thereupon adopted it.[3]

[1] Threatening to resume 'full liberty of action'.

[2] Turkey was not a Member of the League, see p. 25.

[3] It is noteworthy that the Council did not decide to send out officials

Again, the resolution proposing a cessation of hostilities between Poland and Lithuania falls into the class of persuasive appeals rather than of dictatorial requests, perhaps naturally so where frontiers are not in existence and subsidiary questions intimately bound up with that of preventing hostilities, such as the arrangement of provisional frontiers, have to be settled to the satisfaction of the parties.[1]

to supervise the provisional arrangement. M. Branting stated that the task 'obviously' could not be done. It was certainly difficult in a remote area inhabited by nomadic Kurds and other rude peoples to exercise any such supervision. The fact remains, however, that a year later a military commission consisting of General Laidoner (an Esthonian) and two other officers were instructed to go to Iraq for the very purpose of investigating the causes of disturbances which persisted after the Brussels line had been agreed to, and it was also hoped that their mere presence would tend to prevent 'incidents'. See p. 108.

[1] Polish-Lithuanian dispute, Sept. 20, 1920, Council Resolution:

(*a*) 'The Council, considering that the immediate cessation of hostilities is an indispensable condition of any useful intervention on the part of the Council of the League of Nations, addresses to the Governments of Lithuania and Poland a most urgent appeal to prevent any hostile acts between their troops.

(*b*) The Council proposes to the Governments of Lithuania and Poland that they shall bind themselves by the following reciprocal undertakings:

1. The Lithuanian Government adopts as a provisional line of demarcation, reserving all its territorial rights and awaiting the result of its direct negotiations with Poland, the frontier fixed by the Supreme Council of the Allies in its declaration of the 8th December, 1919, and undertakes to withdraw its troops from the territory to the west of this line.
2. The Government of Poland undertakes, reserving all its territorial rights, to respect, during the war now in progress between Poland and the Government of the Soviets, the neutrality of the territory occupied by Lithuania to the east of the line of demarcation above specified, provided that respect for this neutrality be also secured from the Soviet authorities by Lithuania.

(*c*) The Council offers to the Lithuanian and Polish Governments, in the event of their accepting the present provisional arrangement, to appoint a commission entrusted with the duty of ensuring on the spot the strict observation by the interested parties of the obligations arising from this agreement. . . .'

See also p. 89.

Section 6 (a). THE COUNCIL REFRAINS FROM MEDIATION OR INTERVENTION UNDER ARTICLE XI IN FACE OF A RESORT TO ARMS

At the time of the bombardment and seizure of the Greek island of Corfu by Italy, in September 1923, the Council had before it the following precedents: the telegraphed intervention by a neutral State, Member of the League, convening a meeting of the Council to secure the withdrawal of the invading forces; a resolution by the Council appealing to two Governments (Poland and Lithuania) to suspend hostilities; and the appointment of commissions to supervise the withdrawal of the troops from the invaded territory, or to restore the *status quo*. These measures illustrate the Council's conception of its duties when hostilities have broken out, or when there is a serious threat of a clash. In each of those cases, the Council has resorted to measures varying from mediation to intervention directly aimed at separating the combatants, and restoring peace, a primary duty laid upon it in accordance with Article XI.

The case we have now to consider (in which a disputant, a great Power, Italy, invades the territory of the other disputant, Greece, a small Power, in defiance of the formally expressed desire of the latter to refer the dispute to the League, and persists in holding the territory while the Council is sitting) offers a very dangerous precedent for the following reason: the method deemed by the members of the Council best calculated to keep the peace in those circumstances, and eventually to secure the evacuation of the troops, was for the Council as a body to refrain from acting under Article XI and from considering any of the measures permissible under it, even that of attempting by a mediatory appeal to secure the withdrawal of the troops; in short, the Council as a body was to refrain from making, either in blame or in justification, any direct reference whatsoever to the hostile act of one of its members. Truly a paradoxical situation

which, if frequently repeated, must deprive the Council of its *raison d'être*.

The circumstances can be briefly stated. The Italian members of the Commission charged by the Ambassadors' Conference with delimiting the frontiers of Albania were ambushed in Greek territory, as they were motoring to their posts, and all were killed, including General Tellini. The Italian Government at once held the Greek Government responsible and presented a number of demands,[1] and insisted on a reply within twenty-four hours.

The Greek Government replied to this ultimatum within the time specified, and accepted four of the demands, but considered that it was not guilty of an offence against Italy and 'was unable to accept the demands formulated under Nos. 4, 5, and 6 of the Verbal Note, which outrage the honour and violate the sovereignty of the State . . .' The Note ended with the following statement:

'If, contrary to anticipation, the Italian Government were unwilling to recognize the satisfaction given as adequate, the Hellenic Government has the honour to inform the Royal Italian Legation that, in accordance with the provisions of the Covenant of the League of Nations, it will appeal to the League and undertake to accept its decisions.'

This Note, according to M. Politis,[2] was handed to the Italian Minister at two o'clock on Thursday, August 30.

The reply did not satisfy the Italian Government, and the next day, August 31, ignoring Greece's expressed intention to resort to the League in order to settle out-

[1] Summarized, the essentials were: (1) Full and formal apology by Greece; (2) solemn funeral service for victims in Catholic cathedral at Athens; (3) Italian flag, hoisted by Italian squadron off Phalerum, to be saluted by Greek battleships flying the Italian flag; (4 and 5) Greece to carry out within five days a very strict inquiry 'with the assistance of the Italian Military Attaché'; (6) all persons found guilty to be sentenced to death, and Greece to pay Italy within five days 50,000,000 lire (about £500,000) as penalty; (7) Military honours to bodies of victims on embarkation.

[2] Minutes of the Council, Sept. 1, 1923.

standing differences, the Italian Government ordered the fleet to bombard the Greek island of Corfu, together with adjacent Greek islands. Corfu was occupied at 5 p.m. that day after a bombardment of dismantled forts containing Greek and Armenian refugees, fifteen of whom were killed and many were wounded.

The Council of the League was in session at the time, and the Assembly was to meet in two or three days, so that the complete machinery of the League was immediately available. On August 31, M. Politis, the representative of Greece, who was already at Geneva, drafted a Note to the Secretary-General, bringing the dispute before the League. The letter [1] does not refer to the Corfu bombardment, it alludes only to the differences respecting Italy's original demands for satisfaction arising out of the Tellini murders. It is possible that the Note was drafted before news of the Corfu bombardment reached the Greek representative, as it bears the same date: but this question is not very material. It would have been open to M. Politis formally to raise the question of the bom-

[1] Letter from Greek Government to the Secretary-General submitted to the Council, Sept. 1, 1923.

The Greek Government, after regretting the assassination, stated: 'However, before any kind of proof was forthcoming as to the nationality of the aggressors or the motives and circumstances of the crime, the Italian Government . . . threw moral responsibility upon the Greek Government and demanded certain measures of satisfaction and reparation which are incompatible in several respects with the sovereignty of the Hellenic State and the honour of the nation . . .'

The letter then states the Greek Government's reply to the Italian Government, and goes on:

'The Greek Government is making the maximum sacrifices which are compatible with the honour and the sovereignty of Greece. Accordingly, in forwarding its reply to the Italian Legation at Athens, the Greek Government informed the latter that it had decided to place the dispute before the Council of the League of Nations, with a view to arriving at a friendly and equitable settlement. In acquainting you with those facts, I have the honour, by order of the Greek Government, to beg you to bring this question before the Council at the earliest possible moment, by virtue of Articles XII and XV of the Covenant.'

(Signed) POLITIS.

bardment under Article XI at the Council meeting on the next day, September 1, when his appeal was considered.

Although the original dispute was not over Corfu, and was referred by Greece to the League under Articles XII and XV, for one of the disputants to resort to arms, and occupy the territory of the other, in face of the latter's expressed intention to submit outstanding differences to settlement by the League was surely a matter coming within the ambit of Article XI (*War or threat of War*), and so entitled the Council to take its customary action of securing the withdrawal of the troops from foreign soil if possible before proceeding to deal with the original causes of the dispute. This course was not taken.

The question was not formally raised by the Greek representative, although M. Politis referred in a perfunctory way to the desirability of restoring the *status quo*. It is curious that in so doing M. Politis had the hardihood to refer to Article XVI. As acts of violence, he declared, were committed only a few hours after notification was given to the Greek Government, and after the latter had expressed its desire to bring the matter before the League of Nations, it may be asked whether this was a case contemplated by Article XVI of the Covenant: 'Should any member of the League resort to war in disregard of its obligations under Articles XII, XIII and XV, it should *ipso facto* be deemed to have committed an act of war against all its members.'

M. Politis continued that, as the Italian communiqué had referred to the pacific character of this step (a pledge to ensure compliance with the demands), the Greek Government 'was inclined to profit by the doubt in order not to take the initiative in asking for the application of Article XVI.' But the facts required, he continued, and 'his wishes too', that the Council should assure settlements in accordance with Article XV, paragraph 3.

It is worthy of note that the application of Article XVI (which contemplates action against an aggressor, against a State recognized by the Council to have gone to war in

defiance of its obligations) was not entertained for a moment, even by M. Politis, who referred to it. In the situation in which he found himself, his chief concern was not to restrain the aggressor by force, but to secure his evacuation from Corfu by other means. But M. Politis did not suggest an alternative course. He lost a valuable opportunity when, instead of making this reference to punitive action (Article XVI)—action which he himself dismissed as out of the question—he failed to declare, in view of the Corfu incident, the competence of the Council under Article XI to take any steps to safeguard the peace.

Although this alternative course would have brought about the formal and direct reference to the Council of Italy's warlike action, the Council could have followed it without being first obliged to establish the difficult assumption that Italy had been guilty of a violation of the Covenant. Under Article XI, moreover, the mediation of the Council could have been persuasively exercised—without perhaps hurting the susceptibilities of an over-sensitive Italy—by an appeal to both parties to respect the *status quo* and suggesting that all troops should be withdrawn behind their national frontiers. But neither M. Politis nor the Council felt able to take even so mild a step. It is possible that the scope and advantages of action under Article XI were not at that time so fully appreciated as in later years. Probably other reasons also made the Council shrink from action, in spite of Lord Cecil's bold reference to Italy's 'act of war', and to the need for restoring the *status quo*, a need, however, which he did not insist upon. It was stated in the lobbies of the Council chamber that 'Signor Mussolini was conveying in varied terms to every diplomatic representative at Rome that, if matters were left to move on quietly in the hands of the Ambassadors' Conference, he would duly evacuate Corfu without more trouble, whereas intervention by the League would decide him to stay there indefinitely'.[1]

With this threat hanging over it, the Council carefully

[1] H. Wilson Harris.

avoided dealing with the precise question of Corfu, and proceeded, in some confusion and with many sharp passages of arms between Lord Cecil and the Italian delegate, to discuss the demands which Greece could in justice be called upon to fulfil as reparation for the murders, in her territory, of the Italian officers. This was the line of least resistance, though in so doing the Council was on rather doubtful ground, as in fact the Ambassadors' Conference was engaged in that particular task. General Tellini and the other murdered officers had been commissioned by this latter body to delimit the Albanian frontiers, and, immediately on learning of their fate, the Ambassadors' Conference met to decide on the satisfaction to be demanded from Greece for the death of its servants, and Greece had declared herself willing in advance to accept its decision, although she had a few hours previously referred the question to the League.

This then was the situation: The Ambassadors' Conference had taken over the question of the demands to be made upon Greece, Signor Mussolini requesting, with threats, that the Conference should alone settle the matter, whilst the Council plunged into the substance of the dispute. It may be that at the back of the minds of the members of the Council lay the assumption that the Italian act of war gave them an overriding competence and entitled them to deal with the question which the Ambassadors' Conference were discussing, although Article XI was not invoked. In any case, it must be admitted that here the Council showed some fight. They went on discussing what compensation Greece should rightfully make and ignored the threat which hung over them. The Council proceeded to draw up an ideal settlement which was to be forwarded to the Ambassadors' Conference.

But it was at this stage that they missed their great opportunity. We have seen how the Council felt unable to raise formally the question of the occupation of Corfu and to request evacuation under Article XI, and so to show

their disapproval of Italy's action. An opportunity presented itself of showing their disapproval without thereby incurring any subsequent responsibilities. That moment came when they drew up their proposals for the consideration of the Ambassadors' Conference. The opportunity was lost. Their proposed settlement contained no allusion whatever to the desirability of Italy withdrawing unconditionally from the islands. All the proposals contained were the demands which, in the opinion of the Council (as revealed in the discussion, for no formal decision was taken owing to Italy's opposition), Greece should in equity fulfil.

The inclusion here of the proposal to evacuate would have had a triple advantage: (*a*) the responsibility for its execution was a matter for the Ambassadors' Conference, whose decision Italy would probably respect; (*b*) the Council, by stating this opinion, would thereby show its disapproval of Italy's action—an expression of opinion for which, however mildly stated, the whole world was anxiously waiting; (*c*) the consent of the Italian delegate on the Council would not have been necessary for its inclusion: he had already objected to the list of requirements which the Council proposed.

The settlement proposed by the Council was at first adopted by the Ambassadors' Conference, but afterwards modified by it in very doubtful circumstances.[1] And

[1] The League had proposed that Greece should deposit 50 million lire in a Swiss bank as security and that the Permanent Court of International Justice at the Hague should decide the indemnity. The Ambassadors' Conference adopted this suggestion in its Note to Greece on Sept. 7, but six days later it addressed another Note to Greece, stating that the 50 million lire would be confiscated if the Allied Commission of Inquiry reported that Greece had not shown all possible diligence in pursuing her own inquiries relative to the murders. According to Mr. Wilson Harris, this threat was framed explicitly 'in view of the Italian Government's statement that it would in any event evacuate Corfu on September 27'. The association, declares Mr. Harris, 'was sinister . . . Did it mean that Italy agreed to evacuate Corfu for 50 million lire and that the Ambassadors had determined that she should have the 50 million lire one way or another? . . . There may be no ground for the suggestion that such an understanding existed. But it is not surprising that public comments took

Greece was finally compelled to carry out the most onerous demand originally made by Italy, namely, the payment of the full indemnity of 50 million lire. As for Corfu, the Italian Government declared that 'it would in any event evacuate Corfu on September 27'. The circumstances under which that statement was made are ably described by Mr. Wilson Harris.[1] Corfu was evacuated, but Greece's attempt to obtain a mitigation of the main Italian demand had failed. Thus the inability of the Council to restore the *status quo*, or to express an opinion on the Corfu incident, was destined to undermine the just settlement proposed by the Council.

The Council's failure to express its disapproval of Italy's action, not to speak of its inability to restore the *status quo*, raised doubts as to whether such acts might not be regarded as permissible under Article XII. The smaller States were gravely perturbed—their security under the Covenant seemed to be shaken. Had Italy violated the Covenant in invading Greek soil? To the common man the answer was perfectly clear. The whole world was outraged by Italy's action and looked on amazed and perturbed while the Council sat silent. In defence of the Council it has been argued that definite action on its part would have exacerbated the situation; that no one knew what an excited Italy would do; and that in the end Italy did evacuate the island. Such a defence should not be lightly used, for it amounts to saying that, when war threatens, the Council's intervention is considered to do more harm than good. Besides, to have to sit silent under a threat expressed in a resort to arms on the part of one of the members of the Council is not a situation to be viewed with complacency in an estimate of the Council's capacity to maintain peace.

that direction. For on September 26th, the Italian Ambassador having announced that Italy intended to evacuate Corfu the next day, the Italian Ambassador and his British, French, and Japanese colleagues discovered that Greece had not been as zealous as she might have been in dismissing local officials, and ordered her forthwith to pay over the 50 million lire.'

[1] See footnote on previous page.

We have also seen that the evacuation was followed by compliance on the part of Greece with the demand to which objection was originally made and which caused the appeal to the League, namely, the payment of the full indemnity asked for by Italy. If Greece had at once complied with this demand, Italy might equally have at once evacuated the island. If at the end of the League's mediation, Greece had still to comply with the most onerous demand, it is difficult to see where lay the effectiveness of the League.

Whatever view may be taken, the fact remains that the Council, by its collective silence in face of Italy's 'act of war', and by its failure to express its disapproval in view of a Member's obligation under Article XII not to resort to war, temporarily weakened confidence in the League as an instrument of peace, and shook the sense of security. Lord Cecil, in the discussions[1] which subsequently took place at the meetings of the Council, not on the specific questions as to whether Italy had or had not violated the Covenant, but on the general question of the validity of a resort to arms under Article XII, felt compelled to propose a resolution in which the Members of the Council reaffirmed their loyalty to the Covenant.

It is possible that had Lord Cecil's courageous efforts been better supported by the French delegate, the Council might have been less timorous. But at a time when France was occupying the Ruhr as a pledge to obtain satisfaction from Germany respecting reparations—an action whose validity, according to the British Law Officers of the Crown, was doubtful—it was scarcely conceivable that a similar action by Italy to obtain satisfaction from Greece would have been effectively condemned by the representative of France on the Council of the League. In the Greco-Bulgar dispute, which occurred after the conclusion of the Locarno Treaty—a period when France and Great Britain worked harmoniously together, the authority of the Council was unquestioned, and its actions were unequivocal.

[1] See Section 6 (b), p. 82.

Section 6 (b). THE QUESTION OF THE VALIDITY OF A RESORT TO ARMS UNDER ARTICLE XII

The Council's silence in respect of the Corfu incident raised doubts as to whether Italy had violated Article XII of the Covenant in bombarding and occupying foreign territory. The Italian representative had contended that it was not an act of war, but a pledge justified by international law to secure the compliance of Greece with the just demands of Italy.

The members of the League were seriously disturbed by this contention. The Council did not officially raise this question nor attempt to answer it. But in the subsequent discussion which arose, after the conclusion of the Corfu dispute, on the meaning of Articles XII to XV of the Covenant, it was agreed to put certain questions to a Committee of Jurists. The Italian representative defeated even at this stage the attempt of the Council to put the fourth question—the question relevant to our discussion—in such a way as clearly to fit the case, that is, the case of the occupation of foreign territory. The vital phrase was whittled down to the too comprehensive one of 'measure of coercion', which might or might not mean a resort to arms.

The question put to the Committee of Jurists by the Council was as follows: 'Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles XII to XV of the Covenant when they are taken by one member of the League, without prior recourse to the procedure laid down in these Articles?'

To this the following reply was given: 'Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles XII to XV of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures

adopted, whether it should recommend the maintenance or the withdrawal of such measures.'

Neither the question nor the answer throws any further light on the admissibility of Italy's action under Article XII. The answer states that it is for the Council to say whether in any given case Article XII is in fact violated. But in the case under discussion we have seen that the Council gave no formal opinion as a body. It signally failed to do so in a specific case.

Dr. McNair[1] states that the answer positively admits that measures of coercion, which include even the use of force, may not necessarily be a violation of Article XII, and that, as it was accepted by the Council, an Article which can bear such an interpretation reveals a grave defect in the Covenant.

This view is not maintained by Professor Brierly, who points out that the Committee of Jurists were asked 'to advise not on the facts of this incident but on the abstract question whether measures of coercion not intended to constitute acts of war are consistent with the Covenant, and the reply was, in effect, that they might or might not do so. Probably the answer turns on the nature of the coercive measures taken; they are not consistent with the Covenant merely because they are not *intended* as acts of war by the State taking them, nor again because the State against whom they are directed does not, as Greece on account of her weakness did not, treat them as acts of war. On this view', concludes Professor Brierly, 'an

[1] 'Thus it was put on record by the Committee of Jurists', comments Dr. McNair, 'and accepted by the Council of the League, that the obligation of Article XII of the Covenant, "in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council", is not necessarily violated by the use of "coercive measures", even when—for such seems to be the full inference from the circumstances giving rise to the interpretation by the jurists—those coercive measures involve the application of force. If this interpretation is correct, it indicates a serious defect in the Covenant, which demands amendment.' (Oppenheim's *International Law*, 'Disputes', p. 102, Dr. McNair's edition.)

embargo on shipping might be consistent with the Covenant, but certainly not a bombardment.'[1]

Professor Brierly's reading gains added force when one notes the qualifications made by certain members of the Council on accepting the reply, namely, M. Branting, the representative of Sweden, and M. Guani, the then President of the Council, speaking on behalf of the Government of Uruguay. M. Branting declared as follows:[2]

'The Commission of Jurists has not indicated the cases in which coercive measures are legitimate and the cases in which they are not. It is evident that the reply of the Commission might cover different opinions as to the legal character of certain coercive measures. In these circumstances my Government would have liked this question to be referred to the Permanent Court of International Justice in order that a clear opinion might be obtained on this extremely important and very delicate problem. As, however, this suggestion has not been favourably received by my colleagues, *I declare in accordance with my instructions, that my Government maintains in its integrity the interpretation of the Covenant on this subject, an interpretation which was supported by me during a previous session of the Council, and that it therefore continues to be of the opinion that the use of armed forces is not compatible with the Covenant in the circumstances indicated in the fourth question. I accept the fourth reply subject to this declaration.*'

The President of the Council made the following comments:

'The Government of Uruguay would have preferred a clearer reply to the fourth question. It appeared desirable, for example, that the kind of measures described as measures of coercion not intended to constitute acts of war should be more precisely defined. I have reason to think that, outside the refusals of a legal, economic, or financial character, any other acts of force by one State against another should be excluded, without taking account of the description of these measures given by the State applying them. It might also be added that no measures of coercion of this last character should be contemplated before the peaceful means for settling disputes between States Members of the League mentioned in

[1] *The Law of Nations*, J. L. Brierly, p. 195.

[2] O. J., Apr. 1924, p. 525. Council Meeting of Mar. 13, 1924.

Articles XII to XV of the Covenant have been exhausted. These measures include diplomatic negotiation, arbitration, reference to the Permanent Court of International Justice, or the mediation procedure of the Council.

'I would point out to my colleagues that, in conflicts of this character which have arisen in the history of the American nations, the point of view adopted in this subject, even before the signature of the Covenant, clearly tended towards the exclusion of such measures of reprisal and towards the adoption of the settlement by arbitration of all international disputes.

'Having made these declarations, I accept the legal replies.'

Thus M. Branting, speaking on behalf of the Swedish Government, declared that in its view 'the use of armed forces' was not compatible with the Covenant in the circumstances indicated in the fourth question, and the President of the Council declared that in his view reprisals other than economic or financial were excluded under the terms of the Covenant. One may infer from the circumstances which gave rise to these expressions of opinion as to the permissibility of resorting to arms in general, that both M. Branting and the President of the Council were of opinion that the principle had been infringed in the specific case recently before them and that Italy had violated the Covenant.[1]

Further light on the validity or otherwise of resorting to arms under Article XII of the Covenant is thrown by the discussions arising out of the Greco-Bulgar case, and as they have a direct bearing on the foregoing case, as was admitted at the time, it is convenient to refer to them in detail here.

When, after restoring peace, the Council examined the rights and wrongs of the Greco-Bulgar dispute,[2] in the course of his defence, the representative of Greece attempted to justify the movement of troops into Bulgaria by relying on this very answer of the Jurists, and after

[1] Prof. Brierly talks of 'such palpable breaches of international law as the invasion of Belgium, or the bombardment of Corfu in 1923' (*Law of Nations*, p. 49).

[2] See p. 155.

reviewing the Council's conduct in the Greco-Bulgar case, declared that its decision created a new situation showing an advance on the position in which the Jurists' reply had left matters.

The Greek representative, M. Rentis, spoke as follows:[1]

'Had not my country the right to have recourse to coercive measures with a twofold object, (1) to compel the Bulgarian Government to pay her reparations, (2) to compel the Bulgarian Government to withdraw the troops from the occupied point, which was of such great importance to Greece? I refer to a decision of the Council of March 13, 1924, which approved the opinion put forward by the legal experts of the League . . . .'

'The Council has had submitted to it the dispute with which we are concerned, and the Greek Government complied with the decision of the Council by evacuating the territory eight hours before the period fixed had expired. In referring, however, to that decision of the Council, the Greek Government considered that it was entitled to take coercive measures. The Secretary-General gave, in March 1924, in London, a definition of coercive measures. In the Report of M. Caclamanos, Greek Minister in London, it is stated that, according to Sir Eric Drummond, coercive measures begin with the seizure of postal bags and end with the occupation of territory, and the institution of pacific blockade. The great value of the decision, according to Sir Eric Drummond, is that the Council is considered to be competent and therefore can by its intervention put a stop to coercive measures and so remove all threat of war.'

'I think, however, that, since March 1924, international law has, in general, developed in the direction of the stabilization of peace. I think that the present tendency is no longer to take as a unique basis the fourth point of the opinion expressed by the legal experts. Some persons go so far as to ask that this opinion and the decision of the Council should be abolished. Further, I remember the protest which that great Swedish statesman, M. Branting, made against this decision at a meeting of the Council. It may be therefore that this resolution will be amended.'

'This state of affairs, in my opinion, however, furnishes Greece with an argument which may explain her attitude—that is to say, that she did not contemplate committing acts contrary to the

[1] O. J., Feb. 1926, p. 115 (Dec. 1925).

stipulations of the Covenant—I ask the Members of the Council to take account of that fact.'

At a later meeting of the same session of the Council, Sir Austen Chamberlain, Rapporteur in the case, reading the report to be adopted by the Council, declared,[1]

'We believe that all the Members of the Council will share our view in favour of the broad principle that where territory is *violated without sufficient cause*, reparation is due, even if at the time of the occurrence it was believed by the party committing the act of violation that circumstances justified the action. We believe this to be a principle which all Members of the League of Nations will wish to uphold and which both Bulgaria and Greece would wish to support, even if they had not already accepted in advance, as in fact they did explicitly at Paris, whatever decision the Council might reach on this point.'

Sir Austen Chamberlain's statement, read with the greatest formality, acquires greater significance from the fact that it was part of a motion proposing the adoption by the Council of the findings of the Rumbold Commission of Inquiry[2] which had investigated the facts of the Greco-Bulgar dispute: and this Commission expressed the opinion that, even although the Greek invasion was intended to be nothing more than a 'policing operation', nevertheless, '*by occupying a part of Bulgarian territory with its military forces, Greece violated the Covenant of the League of Nations*'. And on the strength of that opinion the Commission proceeded on the spot to fix definitively the reparations in respect of loss for movable property suffered by Bulgaria.

The Commission admitted that there was no premeditation on either side, and that the Greeks had limited objectives. 'Probably Greece did not weigh all the possible results of its action, nor perhaps did it realize that, without having sent an ultimatum, it was committing an act of war against Bulgaria.' The analogy with the seizure of Corfu by Italy seems a close one. Italy had limited objectives and did not contemplate war; like Greece in

[1] O. J., Feb. 1926, p. 173 (Dec. 14, 1925). [2] See p. 155.

1925, Italy opened fire without having sent an ultimatum. Greece, in 1925, 'violated the Covenant'. What of Italy in 1923, when she resorted to a measure which was no less an act of war?

While the contrast in the attitude of the Council on both occasions is very striking, the principles laid down in 1925 have a definitive bearing on the Council's acceptance in 1923 of the Jurists' opinion quoted above. It was on this ground that the Greek representative was so readily induced to accept the report of the Rumbold Commission, whose findings were so unfavourable to his country. In consenting to carry out the recommendations of the Rumbold Commission in accordance with the decision of the Council, M. Rentis said that he had already formed the impression that the evolution in the rules established by the Council was tending to strengthen peace: the British representative had emphasized in his report the great principle of the inviolability of a nation's territory: he himself would express a desire that this principle should henceforth be invariably respected and consistently applied for the guarantee of peace.

One should also quote a passage from a speech by M. Briand delivered at the Extraordinary Session of the Council (October 28, 1925) in the course of the same dispute:

'He had understood the representative of Greece to indicate that all these incidents[1] would not have arisen if his country had not been called upon to take rapid steps for its legitimate defence and protection. It was essential that such ideas should not take root in the minds of nations which were Members of the League and become a kind of jurisprudence, for it would be extremely dangerous. Under the pretext of legitimate defence, disputes might arise which, though limited in extent, were extremely unfortunate owing to the damage they entailed. These disputes, once they had broken out, might assume such proportions that the Government which started them under a feeling of legitimate defence would be no longer able to control them.

'The League of Nations, through its Council, and through all

[1] i.e. occupation of Bulgarian territory.

the methods of conciliation which were at its disposal, offered the nations a means of avoiding such deplorable events.'

In the light of these pronouncements made by M. Briand and by Sir Austen Chamberlain, the nature of the decision reached in the Greco-Bulgar case, with the important conclusion of the Rumbold Commission, and more especially the comments made by M. Branting and M. Guani, it cannot be held that the reply of the Jurists given on March 13, 1924, stands without far-reaching restrictive interpretation in regard to the valid use of coercive measures under the Covenant.

Section VII. FAILURE OF ACTION TAKEN UNDER ARTICLE XI —THE TAKING OF VILNA IN DEFIANCE OF THE COUNCIL'S DECISION.

Justifiable criticism can be made of the conduct of the Council in the Greco-Italian dispute, as the foregoing argument shows. For its inability to prevent the taking of the city of Vilna by Polish troops in October 1920, in defiance of its decision, the Council cannot be so readily blamed. Its failure to prevent that coup should not be quoted in an estimate of the value of League institutions without counterbalancing it with a regard to the circumstances of the autumn of 1920, when the League itself was scarcely in being, and the Great War was still smouldering.

In September 1920 the League of Nations was barely six months old. Since March of that year the Council had been meeting every four weeks and was engaged in setting up the organization of the League. A settled home for it had not yet been found. The Council met alternately in Paris, Rome, Brussels, San Sebastian, and London, whilst a nucleus of the Secretariat had temporary offices in London. When the Polish-Lithuanian dispute threatened to break out into war in September, institutions of the League were not properly functioning, for the simple reason that they were not completed.

Again, the Great War did not end with the German Armistice in 1918; Poland and Russia continued the

struggle at varying intervals—a struggle in which the Allied Powers were greatly interested: France, for instance, the ally and protector of the new Polish State, assisted by supplying munitions and officers. The Russian advance against Poland in the summer of 1920 caused such concern in Paris that M. Millerand, accompanied by Marshal Foch, crossed over in August to Hythe to consider possible action with Mr. Lloyd George, Lord Curzon, Earl Beatty, and Sir Henry Wilson, the chief of the Imperial General Staff.[1] Indeed, at no time did the two great Allied Powers make any attempt, either themselves or through the newly born League, to stop the Russo-Polish war. The Hythe meeting resulted in the mere address of 'councils of moderation' to Poland. Both Allies were in fact eager to see the defeat of Russia. Great Britain had assisted the White Russian General Denikin, whilst France at the time was supporting another White Russian—General Wrangel, who was occupying a long line from the Dnieper to the Sea of Azov at Berdiansk.

It should also be recalled that the Allies had at their command a powerful international instrument—the Supreme Council of the Allies, the arbiter in the years 1918–21 of the destinies of Europe, besides which the nascent Council of the League, attended by minor ministers and senators, seemed vague and shadowy.

Such was the historical background when the Polish-Lithuanian dispute was referred to the League. The circumstances were as follows: Poland, whose eastern frontier[2] had not been fixed by the Allies, but for whom a

[1] Empire Parliamentary Association, Monthly Report, Aug. 1920.

[2] 'On the 8th December, 1919, the Supreme Council in Paris laid down a provisional eastern frontier for Poland, the so-called "Curzon" line, which followed linguistic boundaries as closely as was permitted by the very mixed character of many of these border districts and the doubtful validity of some of the available statistics of population. The northern sector would have formed the frontier between Poland and Lithuania, and this frontier would have excluded from Poland not merely the insignificant Polish minorities in a long corridor extending north-eastwards and through and beyond Vilna, but also the substantial Polish minority in the city of

provisional frontier known as the Curzon line had been laid down by the Supreme Council, had been at war with Russia since 1919, and in April of that year succeeded in capturing the city of Vilna from the Bolsheviks. The Poles 'remained in possession until July of the following year, when it was retaken by the Bolsheviks in the course of their advance into Poland. Whereupon the Bolsheviks, in order to secure Lithuania's support, ceded Vilna and the greater part of the province to the Lithuanians. The fortunes of war changing suddenly in August, the Russian retreat brought the Lithuanians for the first time into direct contact with the victorious Poles, and a collision between Polish and Lithuanian troops actually took place near Suvalki'.[1]

In this confused situation, Poland, whilst still carrying on the war with Russia, appealed to the League on September 5[2] to prevent hostilities between her and Lithuania. An immediate meeting of the Council was not held on receipt of this communication. As the Council was to meet on the 16th, it was considered sufficient to place this urgent matter on the agenda of the session which was to be held a fortnight later.

When the Council met in due course, its deliberations, in which the issues were rather confused, were spread over

Vilna. For the moment the potential problem thus created remained in abeyance; the Curzon line was only provisional, and Polish forces were almost everywhere in occupation of territories far to the east of it, including at this time the district of Vilna itself.' A. J. Toynbee, *Survey of International Affairs*, 1920–3.

[1] See Arnold Toynbee, p. 251, *Survey of International Affairs*, 1920–3.

[2] The telegram from Prince Sapieha dated Sept. 5 was handed to the Secretary-General, Sir Eric Drummond, at his office in London, declaring that Lithuania had committed an 'act of agression' against Poland in supporting the Bolsheviks and occupying Polish territory, and that Poland 'will be obliged to consider a state of war as existing with Lithuania, if within a few days' time the Lithuanian troops have not completely evacuated Polish territory and have not ceased to co-operate with the Bolshevik army.' In appealing for the intervention of the League, Prince Sapieha made no formal reference to Article XI, though at the Council meeting Article XI was invoked.

another four days before an armistice arrangement was proposed, and Poland and Lithuania were given time to consider whether they would accept the proposal or not.

The arrangement proposed by the Council in its resolution of September 20,[1] for the acceptance of the two Governments, was a provisional one, recognizing the Curzon line for the time being as the frontier between Poland and Lithuania, and required that Lithuania should withdraw its troops 'from the territory to the west of this line', whilst Poland, 'during the war now in progress between Poland and the Government of the Soviets', should undertake to respect the territory occupied by Lithuania to the east of the line of demarcation, provided that respect for this neutrality would also be secured from the Soviet authorities.

The arrangement left Vilna provisionally in the hands of the Lithuanians. A Military Commission was to supervise the execution of the arrangement, while a Committee of three members of the Council, to be chosen by the President, were to be responsible for these measures.

This arrangement seemed promising: a League Military Commission to be in control of the situation and in constant touch with a Committee of the Council. But its execution was poor. A fortnight had elapsed between Poland's appeal to the League and the resolution of the Council on September 20 proposing an armistice. Another fortnight passed before the Military Commission appointed by the Committee of Three and entrusted to supervise the execution of the 'armistice' (or more strictly the cessation of hostilities) arrived on the scene of action. Thus, from September 5 to October 4,[2] a full calendar month

[1] The resolution passed by the Council on Sept. 20, 1920, by a unanimous vote, the consent of the representatives of the disputants being subject to the approval of their respective Governments, an approval which was given in due course. (See p. 72 for full text.)

[2] One should contrast the swiftness of the action of the military attachés in the Greco-Bulgar case, five years later, when the League was more experienced—they were on the field of action and supervising the execution of the 'armistice' within a few hours of the Council's resolution.

was wasted before the Commission got to work, and during that interval hostilities continued, even after September 20, in spite of the Council's resolution.

Indeed, on September 27, so menacing had the situation become that Lithuania appealed in her turn under Articles XI and XII for a special meeting of the Council, 'in order to consider the situation created by the Polish invasion of Lithuania', and in a note made by the Secretary-General relative to a conversation with the Lithuanian Minister in London on the same date, Sir Eric Drummond reported: 'He (the Lithuanian Minister) does not conceal his preoccupation that Poland aims to occupy Vilna and to have the fact accomplished before further discussions between the two Governments take place.'

The Secretary-General rejected the appeal on the ground that 'the situation created by the Polish invasion was considered by the Council at its recent session', and its Committee, consisting of the President, M. Léon Bourgeois, and two others, were to take such action as they might consider necessary, and they 'have practically completed the nomination' of the Military Commission. 'Should a position arise to deal with which the Committee considers a full meeting of the Council necessary, the Committee will without doubt take the necessary steps for the immediate convocation of the full Council.'[1]

This rejection we now see in retrospect was possibly a mistake, particularly as neither the Committee of Three nor the Military Commission were as yet in touch with the situation. An Extraordinary Session of the Council, summoned to meet in order to insist on respect being given to the terms of the Resolution of September 20, might have afforded the Commission the authoritative backing which it sadly needed later.

Precious days were lost after Lithuania's appeal on September 27. The Commission did not arrive on the scene until October 4, and met the representatives of

[1] O. J., S. S., No. 4, p. 79.

Poland and Lithuania at Suvalki. Here, on October 7, a line of demarcation between the rival troops was agreed upon. It 'corresponded closely with the Curzon line in the Suvalki sector, and then turned eastwards until it struck a point on the Lyda-Vilna railway, leaving the city of Vilna many miles away on the Lithuanian side'.

This line was timed to come into force on the 10th October, but in the meantime, on the 9th, a few hours before the agreement was to be carried out, the Poles forestalled it by a *fait accompli* which placed the city of Vilna in their hands. One of the leading generals of the Polish staff, General Zeligowski, detached a force of 20,000 men from the main army, called himself a rebel, crossed the line of demarcation, and entered Vilna, the Lithuanian Government moving with all haste to Kovno. This act was hailed with enthusiasm by Polish public opinion, and General Zeligowski was made immediately afterwards a Citoyen d'Honneur by the Polish Government for his services.[1] But meanwhile Poland, being bound by the resolution of September 20, disavowed all responsibility —a disvowal which convinced no one. Nothing could excuse such action: it was 'a manœuvre apart from any military operation against the Soviets', as stated by the Secretary-General in his report to the Council, and it was contrary to the obligations incurred when Poland accepted the resolution of the Council of September 20. As the Secretary-General stated, 'the expression "occupied by Lithuania" leads to discussion, and we know that Poland and Lithuania interpret it in a different manner. Even if it has to be interpreted literally, as meaning the territory effectively administered by the Lithuanian Government on 20th September last, there is no doubt that Vilna, being then the seat of the Lithuanian Government, was included in this territory. It must also be noted that this town has remained outside the zone in which the Polish and Soviet troops met.'

The Military Commission had been ignored; they had

[1] See O. J., S. S., No. 4.

failed to forestall the coup, although they knew it might take place, as on October 4 they received an assurance from the Polish Foreign Minister and the Polish Commander-in-Chief that the attack would not occur.[1] In view of Lithuania's urgent appeal to the Council for a special meeting a few days earlier, and the Secretary-General's reply[2] pointing out that the Commission would send reports on which the Committee would act, it is relevant to ask whether they should not at least have warned the Committee of Three of the approaching danger and taken more vigorous action. They were probably too late on the scene to be properly acquainted with all the factors in the situation.

Perhaps the League's authority might have been more effectively exercised if the control of the situation, by a series of extraordinary coincidences, had not been so completely in the hands of French nationals. France, as we have seen, at that time was Poland's chief friend and protector, and French public opinion greeted the news of the fall of Vilna with enthusiasm. Without reflecting on the impartiality of the French personnel, one can still maintain that in such conditions it would have been better if the settlement of the Polish-Lithuanian dispute had been entrusted to other nationals. In subsequent disputes care has been taken to select the leading officials and rapporteurs engaged in the case from States disinterested in its settlement.[3]

On this occasion the head of the Military Commission was a Frenchman, Colonel Chardigny.[4] The Committee of Three, Members of the Council, with whom the Commission was to keep in contact, consisted of M. Léon Bourgeois, the President of the Council residing in Paris, and the Japanese and Spanish Ambassadors in Paris, and this Committee in its turn was served by a distinguished

[1] O. J., S. S., No. 4, p. 4.

[2] See p. 93.

[3] See p. 142.

[4] Assisted by Colonel Vergera (Italy), Major Keenan (Great Britain), Colonel Herce (Spain), and Captain Yanamaki (Japan).

French member of the League Secretariat, M. Mantoux, the head of the Political Section, who had been sent to Paris to watch developments, the rest of the Secretariat being in London.

Telegrams from Colonel Chardigny were sent usually through the good offices of the French Minister in Warsaw, thence to the French War Office, and finally to M. Bourgeois's villa in Paris.[1] There was evidently confusion and delay arising from the improvised arrangements. M. Bourgeois, three days after the fall of Vilna, was obliged to telegraph to Colonel Chardigny, in view of the gravity of the news regarding Vilna, 'I should be obliged if you would inform us as to where the Commission is at present, whether its authority is respected, and whether it desires action by the Council'. Three days later, on October 15, Colonel Chardigny replied from Warsaw to M. Bourgeois's plaintive request, 'With the exception of the situation resulting from the occupation of Vilna, the Commission has been able to obtain respect for its authority from the two parties, both as regards its recommendations for determination of neutral zone of 12 kilometres, and with respect to the cessation of hostilities . . .'[2] Confronted by the disastrous *fait accompli*, the Commission contented itself with merely adding that 'the situation was so complex and obscure' that they confined themselves to establishing a line of demarcation in the territory from Suvalki to the Niemen (the original Curzon line). The 20,000 rebel troops were left in possession of Vilna.

The Commission having sat down under the coup, what action did the Council take to secure respect for its resolution of September 20? Mr. Fisher, the British Minister of Education, telegraphed his concern to M. Bourgeois, and the latter, summoning his two colleagues, the Ambassadors of Spain and Japan, endeavoured on October 18, nine days after the coup, with their help, to impress M.

[1] See O. J., Special Supplement, No. 4.

[2] O. J., Special Supplement, No. 4, p. 18.

Paderewski, the representative of Poland in Paris, with the fact that the occupation of Vilna 'is a violation of the engagements entered into with the League . . . and if Vilna is not evacuated very shortly, the Council of the League will feel itself obliged to meet forthwith to examine the situation'. On the same day a message is sent by M. Bourgeois—not to the Polish Government in Warsaw, but to the Press, in which the determination of the Council to insist on respect being given to its undertakings is set forth. Colonel Chardigny obtains no new instructions: he is merely informed by telegram of the happenings in Paris. We find, in addition, that M. Mantoux has informed Sir Eric Drummond that he (M. Mantoux) 'has decided to take no further action with the Poles with a view to explaining to them what the League hopes their Government will do, since he has been informed this morning by M. Berthelot' (the permanent head of the French Foreign Office) of the Polish Government's declaration (i.e. the declaration through its Minister in Paris that it has formally condemned the action of Zeligowski, and has stated that it is ready to take the necessary measures to close the incident).[1] M. Mantoux's Note continues that the Paris Press has received mention of the Polish declaration, and ends with the suggestion that the Polish Government's disavowal was probably only of a moral nature.

Could anything have been more ineffective than to send a communication to the Press warning Poland at a moment when nothing short of a special meeting of the Council attended by the Foreign Ministers of the Great Powers was the very least demanded by the circumstances: and it was scarcely prudent of the French head of the Political Section of the League Secretariat to take advice from the Quai d'Orsay to the effect that further action was not desirable, particularly in view of the fact that the Secretary-General had reassured Lithuania on September 27 that the Committee of Three would doubtless call

[1] See O. J., Special Supplement, No. 4, p. 37.

a meeting of the Council, if the circumstances, such as an attack on Vilna, required such a measure.

Once more the Lithuanians appealed to the League for more vigorous action. On the 11th of October, in a letter to Sir Eric Drummond, they 'requested the League to apply Article XVI of the Covenant, to compel the Warsaw Government to submit the case to the League's arbitration', to which the Secretary-General replied that the letter would at once be circulated to members of the Council, but that the Military Commission was already on the spot, and the Council would, no doubt, consider the situation in the light of its report.

No special meeting of the Council was convoked by the Committee of Three; matters were deferred until the next Session at Brussels, which was to open on the 20th. Even so, the Council dealt with other matters until the 26th, when it turned its attention to the Vilna question.

The application of Article XVI was out of the question; no one considered it for a moment: economic sanctions, for instance, could not be applied against a country flanked on either side by Germany and Russia, neither of which belonged to the League, not to speak of innumerable other difficulties. The Allied Powers on the League Council were not going to hamper Poland in its struggle with the Soviets.

The Secretary-General in a Note[1] to the Council suggested what in the circumstances was possible.

'It is evident that, according to the declarations of the Polish Government and by reason of the state of opinion in Poland, the forcible expulsion of the troops at present occupying Vilna is not to be expected. The application of a measure of economic coercion which would affect the Polish population is not to be considered: but it is possible to ask the Polish Government to withdraw all its regular troops beyond the line of demarcation, which will have been

[1] This practice of the Secretariat of suggesting to the Council what action to take in any given circumstance was very prevalent in the first two or three years of the League, but it gradually dropped when Members of the Council took the initiative into their hands in later years.

fixed so that the troops which occupy Vilna are completely isolated, and to agree to hold no communication with these troops, nor yet to allow the entry of any supplies of food or munitions essential to them.'

The Council took a very different line from the practical course suggested by the Secretary-General. It heard the parties to the dispute on October 26: the Polish representative rather brazenly attempted to withdraw the issue from the Council's hands, now that Poland was in possession of Vilna and had also signed a victorious peace with Russia on October 12 at Riga. By appealing to the League under Article XI, Poland had obtained Lithuania's neutrality during her struggle with the Soviets. Having under these conditions beaten the Soviets and taken Vilna as well, 'the benevolent intervention' of the League was no longer required.

This was too much for the Council. Neither Mr. Balfour nor M. Bourgeois tolerated the proposal for one moment: and both declared that no one was entitled to hold that, when two States had submitted a dispute to the League of Nations, one of the parties should on its own authority withdraw. The Polish delegate yielded before this first show of firmness.

The Council, however, did not persist in an attitude of firmness. On the contrary, it noted the 'solemn' declaration by which the Polish Government 'has disclaimed responsibility for the action of General Zeligowski and has declared him a rebel'—a disclaimer which deceived no one for an instant—and proceeded to deal with the problem on the basis of the *fait accompli*.

From here on the dispute takes a different turn: no longer a question of restoring the *status quo*, but of attempting a final attribution of the Vilna territory; the Council's efforts henceforth, admirable as they were, were doomed to failure because of its inability in the first instance to prevent the forcible taking of Vilna, of which it had had warning.

What finally is one to say of this failure? The incom-

plete machinery of the League has been noted, and the consequent improvised arrangements; the delays and hesitating methods of the Military Commission, the weak handling by the Committee of Three, who were unable, through no fault of their own, to keep abreast of the rapid events; the unfortunate coincidence which lay in the fact that the controlling machinery was handled by French nationals from Paris at a moment when France was keenly interested in Poland's fortunes: all due to the fact that the League was in its infancy. There was another and even more serious factor making for failure. The Council was lacking in authority, because the Council at that time did not represent the will of its Governments. Where this will has been clearly expressed, as in the case of the Greco-Bulgar, Yugoslav-Albanian, and Mosul disputes, the disputants bend to it. In 1920 the Allied Powers were anxious to see Russia defeated by Poland; the will to peace was absent, and in appealing to the League under Article XI, Poland was not so much actuated by a desire to preserve the peace of nations, as to secure the neutrality of Lithuania while she fought Russia. The Covenant was being abused to keep the ring for Poland in her struggle with the Soviets. Was it surprising that whilst the Council was not requested to intervene and end the Russo-Polish conflict, Poland felt no compunction in disregarding the Council's decision respecting the provisional peace with Lithuania? It was difficult to expect loyalty to the Covenant under such circumstances.

III

PEACE COMMISSIONS

EFFECTING THE 'CEASE FIRE'

IN four of the disputes which have culminated in an outbreak of hostilities, the Council has sought the aid of a Commission, usually composed solely of military officers, charged by it with the task of supervising the cessation of hostilities, and effecting the withdrawal of the hostile troops behind their national frontiers, or of placing a zone of demarcation between them as a provisional arrangement.

The Council's handling of the Greco-Bulgar dispute[1] once more furnishes a valuable example, which shows in a new bearing the advantage which falls to the Council from a clear separation of its duties. In this case, the Council distinguished between the task of separating the combatants or making a provisional peace and that of investigating the causes which led to the dispute. These two distinct tasks are best undertaken by two different commissions, as was done in the Greco-Bulgar case: the first task needs simply the knowledge and experience of soldiers; the second is more intricate and needs for its execution a personnel selected from different professions.[2]

Another advantage in limiting one commission to the duty of restoring peace, and charging another with investigating facts and other duties, lies in the attitude which the disputants can properly take towards either: it is their moral duty to consent to the former measure as forming 'an action deemed' by the League 'to be wise and effectual to safeguard peace' (Article XI). The views of the Committee of the Council on Article XI[3] bear on this very question.

[1] See Section I, Chapter II, Part II.

[2] See p. 142, Commissions of Inquiry.

[3] See Appendix.

There it is stated that 'Where there is no threat of war or it is not acute . . . if there is a doubt as to the facts of the dispute, a League Commission may be sent to the *locus in quo* to ascertain what has actually happened or is likely to happen. *It is understood that such a Commission cannot go to the territory of either party without the consent of the State to which that territory belongs.*'

But consider what the Committee states to be permissible 'where there is an imminent threat of war':

'In order to satisfy itself of the way in which these measures (i.e. measures ending hostilities) have been carried out and to keep itself informed of the course of events, the Council may think it desirable to send representatives to the locality of the dispute. . . . The Council may also have recourse in this connexion to diplomatic personages stationed in the neighbourhood who belong to States not parties to the dispute.'

In the former case, emphasis is placed on the need for the consent of the disputants to a commission of inquiry entering their territory. In the latter case, where there is a threat of war, or an actual outbreak of hostilities, no mention occurs of such a need; on the contrary, the Council may seek the assistance of military attachés of neutral Powers already resident in the territory of the disputant, and the moral duty implicitly lies on the disputants to grant them all the facilities which they require in their allotted task of arranging the 'cease fire'. As the report was adopted by the 8th Assembly, that duty has been very clearly established by the League, though it does not constitute a legal obligation, unless the parties are signatories of the 'Model Treaty to Strengthen the Means of Preventing War', or of the Locarno Treaties.[1]

The Greco-Bulgar Military Commission.

In the Greco-Bulgar case, the Council of the League had a very clear conception of its task. The demand addressed to the Greek and Bulgarian Governments to give orders within twenty-four hours to their troops to cease

[1] See Section 3, Chapter II, p. 60.

fire and to complete the withdrawal to their respective territories within sixty hours[1] ended with the following request, as peremptory as any request can be:

'In order to assist the Council and the two States, the Council requests France, Great Britain, and Italy to direct officers who are within reach to repair immediately to the region where the conflict has broken out, and to report direct to the Council as soon as the troops of both States have been withdrawn . . .'

'The two Governments (Bulgaria and Greece) are requested to accord to the said officers all facilities that may be required for the execution of this mission.'

This request for facilities to the officers formed part of the resolution requesting the cessation of hostilities, and the linking together of the request to cease fire and the measures deemed necessary to supervise the cessation was extremely advantageous. We have argued at length about the difficulties with which Greece would have been faced had she refused the request to cease fire, and it was advantageous that such a request, so difficult to refuse, was linked indissolubly with the demand for according facilities to the officers to implement that request. The measure was not questioned or discussed by the representatives of Greece and Bulgaria on the Council. They were accepted as part of the decision of the Council.

The officers in question were military attachés of the British, French, and Italian Legations in Belgrade and Athens, and so, being already near the troubled area, could act with great promptitude immediately on their receiving telegraphed instructions from Geneva. The character of their mission in the field can best be given in their own words, in telegrams which they dispatched to the Council, and which the President read out with dramatic effect at the meeting of the Council, which was still sitting in order to examine the factors that gave rise to the dispute. It can be seen from these telegrams how for the time being the attachés, representing the Council of the League, were in command and gave orders on its behalf. The

[1] See p. 50.

representatives of the Council exercised for the time being powers of decision which the disputants as loyal members of the League had undertaken to respect in pursuance of their moral duties assumed under Article XI of the Covenant.

At a meeting of the Council, October 29, 1925, the President read the following telegram addressed to him by the military attachés:

'Siderokastro, October 28th, 1925, 8 p.m.

'Starting on the 27th, we were able to reach the scene of the conflict on the 28th at 2 p.m., thanks to the special trains placed at our disposal by the Yugoslav and Greek Governments. In the course of the afternoon, we got into touch with the Greek and Bulgarian commanders and notified them verbally and in writing of our decisions.

'Both parties formally undertook:

'(1) To refrain from any further hostile act.

'(2) To warn their troops that any resumption of firing would be visited with the severest penalties.

'As regards the withdrawal of the Greek troops, which began to-day at noon, and which, in the case of the artillery and cavalry, we observed ourselves, the Greek command has undertaken to complete the operation within the time limits fixed by us, i.e. by 8 a.m. to-morrow, the 29th, without fail. In order to prevent the incidents which would inevitably occur if the Bulgarian troops began their advance too soon, we have decided that the Bulgarians should not reoccupy the invaded territory until a certain time has elapsed, and, at the Bulgarian Government's own request, the Bulgarian troops will only begin then to reoccupy their former positions on October 30th at 1 p.m. . . .'

The next day the President read another telegram, dated October 29, from the attachés announcing that 'the Greek troops concluded the evacuation of Bulgarian territory on October 28th' without incident, and that 'we shall continue our control operations and shall be present to-morrow at the reoccupation of Bulgarian territory by the Bulgarian troops'. A final telegram stated that reoccupation of the Bulgarian posts by the Bulgarian troops took place without any incident. 'There is complete calm on

both sides. The Bulgarian population which had evacuated the invaded territory has nearly all returned, and life is again taking up its normal course.'

The intervention of the Council, and the swift action of the military attachés, had thus achieved a most brilliant success.

The Albanian Commission

The arrangements made by the Council in the Yugoslav-Albanian case fell short of this standard of efficiency. In section 4 of the preceding chapter were described the efforts made by the Council to settle the dispute between Albania and Yugoslavia, and its reluctant attempt to appoint a Commission. The confusion of issues which, as we noted, marked the discussions, had its counterpart in the composite task[1] allotted to the Commission which was eventually appointed. It was to supervise the evacuation of the Yugoslav troops, and, in addition, to investigate the facts leading to the disturbances and suggest measures for their prevention in future: a mingled task which in the Greco-Bulgar case was carried out by two Commissions,

[1] Resolution adopted by the Council, Nov. 21, 1921, decided to give the Commission of Inquiry *sent to Albania* in accordance with its resolution of Oct. 6 (see p. 68) the following additional instructions:

They were to keep the Council informed of the retirement of both Serb and Albanian troops from the provisional zones of demarcation provided for in the decision of the Conference of Ambassadors, and they were to keep in touch with the Delimitation Commission (appointed to fix the boundaries of Albania by the Ambassadors' Conference) and place themselves at the disposal of the local authorities to assist in carrying out the evacuation so as to avoid incidents.

They were to satisfy themselves that no outside assistance should be given in support of a local movement which might disturb internal peace in Albania, and they were to examine and submit to the Council measures to end present disturbances and to prevent their recurrence.

The sequel is instructive. Before voting for the resolution appointing the Commission, the Yugoslav representative stated that the Commission of Inquiry 'sent to Albania in accordance with the Second Assembly's decision had been given definite instructions and it should be clearly understood that its field of activity should be limited to Albania'.

namely, as we have seen, the Military Attachés, who separated the combatants, and the Rumbold Commission (see p. 155), which investigated the causes of the outbreak and attributed responsibilities.

In so far as the Yugoslav delegate was insisting on his right to withhold permission for a Commission of Inquiry to go into his country, he was acting in accordance with the practice subsequently authorized by the Report of the Committee of the Council quoted on page 102. No one, however, pointed out to him that the Commission was also acting as a Peace Commission, to which facilities should be accorded by both disputants in accordance with their moral duty as Members of the League acting under paragraph 1, Article XI.

The distinction occurred to no one. In any case it would have been difficult to maintain in practice in view of the varied duties of the Commission. Moreover, the Council had not in its resolution (of November 19, 1921) requested that facilities should be given to the Commission by both parties; it authorized the Commission to go to Albania, and did not mention Yugoslavia, though it is difficult to see how the Commission could, for example, 'satisfy itself that no outside assistance is given' to provoke unrest in Albania, unless it could cross the frontier into Yugoslavia.

In consequence of Yugoslavia's attitude and of the Council's defective technique, the Commission[1] did not enter Serb territory and was unable to make as complete a supervision of the process of evacuation as the circumstances demanded. When observing the progress of the evacuation along the northern frontier, its members, anxious to consult the Serbian authorities, asked permission to enter Dibra.[2] The governor replied that he could not

[1] The Commission consisted of two military officers (a Norwegian and a citizen of Luxemburg) and a Finnish professor, the latter's profession being an indication of the fact that the Commission's duties were not solely those of supervising the restoration of peace.

[2] O. J., Feb. 1923, p. 156.

possibly consent without instructions from Belgrade. Again (on November 28, 1921) they were requested by the Secretary-General to visit the Mirdite area in Albania, as it was reported that fighting was still proceeding there. They replied on December 6, declaring their inability to control the situation in the Mirdite area effectively, if their field of activity was confined to Albanian territory. They asked the Secretariat to use its immediate influence with the Government of Belgrade to abandon the standpoint expressed by its representative at the 15th Session of the Council at Paris. But with this request the Secretary-General felt himself unable to comply. He replied, stating that the Commission was limited to Albanian territory by the decision of the Council of November 19.

Then again, on January 10, 1922, the Commission telegraphed to Sir Eric Drummond the fear that forces of approximately 80,000 Serbs were held in readiness along the frontier prepared for all emergencies, including the reoccupation of territory lately evacuated. 'Albanian Government, according to our advice, have issued order to its troops to withdraw if necessity arises without resistance so as to avoid hostilities.' The telegram concludes with this important statement: 'Unable to confirm this information and not authorized to enter Serbian territory, the Commission sends this report to the Council.'[1]

Fortunately, the main task of the Commission was not materially affected[2] by Yugoslavia's obstinacy, and it was finally able to report the complete evacuation of Albanian territory by Serbian troops.

The obstructions suffered by the Commission might have been obviated if the Council at that time had had a clearer conception of its task. They point to the need for specialized functions, so that full use may be made of the political authority the Council may wield in any action taken under Article XI.

[1] O. J., Feb. 1922, p. 157.

[2] With its other duties this section is not concerned. (See p. 160.)

The Laidoner Commission

It is curious to observe that another Commission, whose task was a mixed one of investigating facts and of pacification, failed, as the Albanian Commission had failed, to secure the permission it required to enter the territories of both the disputants in the case. It was not until a year after the reference of the Mosul dispute (See Chapter II, Section 4) to the Council that the Esthonian general, Laidoner, accompanied by two officers, was sent to the Mosul vilayet to investigate the charges which the British and Turkish Governments were making against one another respecting the *status quo* which both had pledged themselves to observe at a special meeting of the Council held in Brussels in October 1924.[1] It was also hoped that the presence of the officers representing the League would act as a pacifying influence and minimize the possibility of disturbances. But this duty was a secondary one: their main task was to investigate the facts relating to past events, the chief of which were the massacre of Assyrians and enforced deportation of the survivors perpetrated in 1925 by the Turks north of the Brussels line, in territory which the British Government held should fall within the northern boundary of the Mosul vilayet in the final settlement.

The maltreatment of the Assyrians was the main ground upon which Mr. Amery based his request for the appointment of a Commission in a letter to the Secretary-General (September 21, 1925). He did not attempt to relate his request to actions taken in accordance with Article XI, of which his letter contained no mention. The Council was apparently not to assume that a threat of war hung between the parties.

In these circumstances, Turkey was able to resist successfully Mr. Amery's attempt to enable the Commission to operate on both sides of the Brussels line[1]—on the side provisionally administered by Turkey, as well as the one provisionally ruled by Britain. So much indeed were the

[1] See p. 70.

investigating duties of the Commission present in the mind of the Turkish representative to the exclusion of its duties to prevent hostile incidents, that he supported the objection to an examination north of the line with the argument that a minorities grievance could alone justify it.

After listening to an argumentative duel between the British and the Turkish representatives, the President of the Council declared the discussion closed, and contented himself with an appeal to Turkey to give the same assurance in regard to the territory north of the line as that given by Great Britain respecting the territory south of the line. Without obtaining that assurance, the Council proceeded nevertheless to pass a resolution, the first part of which could scarcely be acted upon unless Turkey relented. But the Turkish Government remained obstinate and General Laidoner subsequently stated in his Report, 'In accordance with these instructions, my investigation was confined to the area to the south of the Brussels line: this complicated my work considerably and made it difficult to carry it out in the spirit of the 1st paragraph of the Council Resolution of September 24, 1915. The Report is, therefore, almost exclusively based on Part III of the Resolution.'[1]

[1] The Resolution read as follows:

1. 'The Council has received in a letter dated Sept. 21, a request from the British Government for the immediate dispatch to the locality of the so-called Brussels line of representatives instructed to investigate, as far as possible, the charges which have already been made by the two Governments, British and Turkish, and to report immediately to the Council in the event of any similar occurrence in the future.

2. 'The Council has also taken note of the letter of the representative of the Turkish Government dated Sept. 22. It considers that in order better to ensure the maintenance of the *status quo* which the two Governments have agreed to respect, it is desirable to take steps to avoid the serious situation which might result from the spread of news concerning local incidents which are sometimes difficult to verify.

3. 'The Council therefore decides to send to the spot a representative of the League of Nations instructed to keep the Council informed of the situation in the locality of the provisional line fixed at Brussels on Oct. 29, 1924.' (Council Meeting, Geneva, Sept. 24, 1925.)

Within these limits, the Laidoner Commission conducted a very efficient investigation. It acquitted both the Turkish and British Governments of intentional violation of the *status quo* and excused the movements complained of on the ground that the Brussels line was not a natural frontier and would be difficult to maintain until the frontier was 'marked on the ground'. On the other hand, the Commission substantiated the grave charge against Turkey relating to the fate of the Assyrians north of the line. Not being permitted to visit that area by the Turkish Government, the Commission examined as many as possible of the Assyrians who had fled across the border into the territory controlled by the British.[1] Stories of rapine, slaughter, and starvation made a terrible document, the reading of which was destined to have an important influence when the Council had to come to a decision on the substance of the Mosul question.[2]

The Chardigny Commission

The Commission of five officers[3] led by Colonel Chardigny was the first military commission to be appointed by the Council to arrange a provisional peace, and the first and, up to the present, the only Commission, to meet with a failure. The taking of Vilna by Polish troops in October 1920, in defiance of the measures taken by the Commission, and agreed to by Poland and Lithuania in pursuance of the Resolution adopted by the Council, was an event which called for a full examination in the previous chapter, where the powers of the Council were dealt with, and most of the activities of the Chardigny Commission were therein described.[4]

Subsequent to the taking of Vilna, the Commission

[1] The following extract is typical: 'At Baijo alone forty men are stated to have been suddenly taken away from their families, shut up in a remote building, and assassinated in cold blood by Turkish soldiers, who no doubt were anxious not to be disturbed in their orgies by the husbands and parents of the women they intended to outrage.'

[2] See p. 163. [3] See p. 95. [4] See p. 89.

accomplished useful work in laying down zones of demarcation separating not only the Polish regulars and the Lithuanian troops, but also the so-called Polish 'rebels' under Zeligowski (who occupied Vilna and its district) and the Lithuanians, although the latter zone tended to regularize the coup. It is possible that but for this latter zone, skirmishing and fighting might have continued between the 'rebels' and the Lithuanians for some time after the fall of the city. But the Commission's later efforts failed to reduce the forces under Zeligowski, a reduction which the Council in its subsequent resolutions desired Poland to effect in order to maintain fair conditions for a proposed plebiscite.[1]

It would not have been impossible for the Commission to examine the trains that went from Warsaw to Vilna, in order to prevent the dispatch of victuals and munitions to the 'rebel' troops—or, if unable to prevent their dispatch, at least to supply the Council with the proofs that Poland was continuing to defy the authority of the League by dispatching food and munitions. If the head of the Commission did not see fit to take more effective action, blame should chiefly be laid on the Council which had failed to play a decisive role, although condemnation should not be applied with too heavy a hand in view of the circumstances in which the infant League then found itself.[2]

[1] A plan (subsequently dropped) to determine the attribution of Vilna. By a decision of the Ambassadors' Conference in 1923, Vilna became *de jure* part of Polish territory.

[2] See p. 89, Section 6, Chapter II, Part II.

IV

CONCLUSIONS

THE VALUE OF THE COUNCIL'S ACTIONS TAKEN UNDER ARTICLE XI TO PREVENT WAR

HAVING considered the action taken by the Council to restore peace on the several occasions when an imminent threat of war occurred and an actual resort to arms, we are in position to gather up the facts and risk some tentative conclusions based upon them, and so leave to be inferred some estimate of the Council's ability to safeguard peace.

In four or five cases—three involving hostilities between small Powers, Yugoslavia and Albania, Greece and Bulgaria, Bolivia and Paraguay,[1] and one in which war threatened between a small and a great Power, Turkey and Great Britain—the Council's intervention met with success. War was averted, in all cases the invading troops were retired, whilst a provisional peace was arranged in three cases pending a final settlement. The criticisms which were made of the Council's handling of the Albanian dispute do not detract from its major success in bringing hostilities to an end and preventing war.

In the light of the examples we can now resume the uses to which Article XI has been effectively put.

(1) *No resort to force.*

In the three important cases, Yugoslavia and Albania, Greece and Bulgaria, Great Britain and Turkey, involving great and small Powers, hostilities have been brought quickly to an end, or the *status quo* has been restored, by the Council without its having to resort to force; it relied on its moral authority exercised through the immediate inter-

[1] One might add the dispute between Costa Rica and Panama, 1921, see p. 15.

vention of the acting President, of the full Council meeting in public, and of the Commission of Officers which supervised the cessation of hostilities or *status quo* arrangements.

(2) *The sanction of publicity.*

In each of these cases reliance was placed on the factor of publicity as a means of bringing pressure to bear on the disputants to accept the request of the Council to cease hostilities. When the Council was convoked in November 1921 in extraordinary session to deal with the Yugoslav invasion of Albania, it met on the evening of the 16th in private merely to decide that the question should be dealt with on the following day at a public session of the Council; and it will be recalled that in the Greco-Bulgar case although the Council at a private session decided to make its request to cease fire, the compliance of the disputants was obtained in public session. By 1924 public sessions at times of crises had become the normal procedure. The public opinion of the world is thus focussed at a critical moment on the replies of two Governments to questions addressed to them by the Executive Council of the nations as to whether they will or will not cease from disturbing the peace of the world. Governments, at such a moment placed, as never before in history, by means of the far-reaching Press and telegraph literally at the bar of world opinion, have also to reckon with the attitude of their own peoples, which would be gravely affected by the decision of the Council requesting immediate peace.

(3) *Intervention, or 'dictatorial interference'.*

In the Greco-Bulgar case the President acted on his own initiative before the Council met, and exhorted the disputants to cease hostilities. The Council meeting at once within two or three days to support the President's action, was able to exercise 'dictatorial interference' to bring about the separation of the combatants, its request virtually amounting to an ultimatum: such request being

effective because of the firm attitude of the Council, the publicity of its proceedings, and possibly the conservatory measures held in reserve which could be taken under Article XI. It was able to maintain the peremptory character of the intervention until the 'cease fire' stage of its proceedings was completed, and it is most important to note that the Council clearly distinguished between the two stages—the achievement of the provisional peace and the final settlement of the dispute—and so was able to make full use of its political authority in accordance with Article XI, whilst separating the combatants—an authority which would be difficult to bring into play if no such distinction were made.

(4) *Council's overriding competence to restore peace.*

In the Yugoslav-Albanian case the Council showed by its actions that it was competent under Article XI to intervene in a dispute, the substance of which (namely, the fixing of the Albanian frontier) was in the hands of another body—the Ambassadors' Conference. It intervened rather late and rather reluctantly because a clear distinction was not made at the outset between the task of maintaining peace and the settlement of the dispute. In response to the insistent demands of the Assembly it proceeded on October 6 (a month before the Ambassadors' Conference completed their inquiry) to appoint a Commission of Inquiry to arrive in Albania in any case by November 1,[1] and thus established the precedent illustrating its overriding competence to intervene when peace is threatened.

(5) *Separating the combatants rather than war on the aggressor—Prevention rather than cure—Article XI rather than Article XVI.*

In all the urgent cases dealt with by the Council it is noteworthy that its primary occupation was to avoid all measures which would tend to hinder the co-operation of the disputants in the task of restoring peace. It relied

[1] See p. 68.

exclusively on measures of prevention under Article XI, and never had occasion to consider the application of Article XVI to restrain the aggressor.

We have seen how in the Greco-Bulgar case, the Council, although not satisfied that hostilities had ceased after the intervention of the President two days earlier, still proceeded under Article XI; although it knew that, in fact, Greek forces were invading Bulgaria, it addressed a request with its time-limits to both disputants equally. The question of the aggressor did not, in fact, arise at any point in the prevention stage of the Council's proceedings. The Military Commission on the field gave orders to the forces of each of the disputants who were treated on an equal footing.

Compared with action under Article XVI, action under Article XI can thus be taken immediately without first having to establish difficult assumptions, such as the violation of the Covenant, or that war in the technical sense has been resorted to, or without being hampered by the assumption that a 'coercive measure' might be justifiable. It is enough to be convinced that a threat of war exists to enable measures to be taken to bring about the 'cease fire' without assuming the guilt of one disputant or the innocence of its rival. There is less likelihood, too, in such circumstances of hurting the sovereign susceptibilities of disputant States at a difficult moment when the Council is exercising its moral authority in an attempt to restore peace among the 'family of nations'.

This was clearly evident in the handling of the Greco-Bulgar case in which both disputants were warned about the risks incurred *if* the Covenant were violated, and in which neither was condemned out of hand of *having* violated it, although after peace had been arranged Greece was found, in fact, to have done so.

In the Yugoslav-Albanian case we noted Mr. Lloyd George's reference to the possible application of Article XVI in the event of Yugoslavia not withdrawing her forces, and how inconvenient the British representative

on the Council found such a reference when his immediate task was to restore peace; he was careful in his replies to the Yugoslav delegate to refer to Article XI for his authority in order to justify the Council's intervention.

In the Corfu case, M. Politis raised the question of Article XVI only to dismiss it; but even so the reference extremely annoyed the Italian delegate; it would have been far more politic to have quoted the persuasive Article XI at that stage than the criminal article of the Covenant.

In the Polish-Lithuanian case the application of Article XVI was asked for by Lithuania after Vilna had been taken. It was not considered by the Council. The Secretary-General in his report to the Council dismissed the idea in two or three sentences as impractical.

It was in fact only in these early cases that the reference to Article XVI was made, perfunctory as those references were. After 1921, when the Assembly gave its interpretative reading of Article XVI,[1] making its application even more difficult, the Members of the League at all Council meetings, as in the Greco-Bulgar case, ceased even to refer to the Article when an urgent dispute came before it. They became more conscious of the value of Article XI

[1] There are nineteen interpretative resolutions which though not yet ratified represent doctrine which to-day is generally accepted, and even if the doctrine were not accepted, as the Rutgers Memorandum on Articles X, XI, XVI, states, 'the Council could not invoke a text or apply a sanction to oblige a Member to obey the decision of the Council in virtue of Article XVI which that Member did not consider to be well founded. It is the Members themselves who must decide on the performance of their obligations under Article XVI. It must, therefore, be realized that when they are called upon to make this extremely grave decision (e.g. to go to war) they will be guided by their own conceptions of their obligations under Article XVI. It must also be recognized that there would be a certain danger in fixing in an immutable form the measures which might be taken in application of these texts. Indeed an interpretation providing hard and fast criteria for deciding whether there is resort to war or not might force the Council and the Members to declare that the conditions of Article XVI were present at a time when there was still room for hope that the mediation of the Council might stop hostilities which had begun and prevent the irrevocable application of Article XVI'. Committee on Arbitration and Security, C. A. S. 10, Feb. 1928, p. 33.

and theory approximated more closely to the practice, as seen in the Report of the Committee of the Council on Article XI.[1]

(6) *The Peace Commissions.*

Of the three Military Commissions appointed by the Council to proceed to the troubled area, the Greco-Bulgar Military Commission alone was given the clear and single task of separating the combatants; the other Commissions in addition to restoring peace had also to make investigations of fact.

It is noteworthy that in these circumstances the Greco-Bulgar Military Commission alone obtained facilities of free movement in the respective territories from each of the disputants, each loyally complying with its moral obligations to co-operate in safeguarding peace under Article XI. It is also noteworthy that the Council acting under Article XI addressed a firm request to the disputants to grant such facilities.

In the other two cases, the Council did not secure the consent of both of the disputants. Its attitude was anything but firm, and the Council was possibly hampered by the fact, already stated, that the Albanian Commission and the Laidoner Commission, in addition to the duties of supervising evacuation and restoring the *status quo* were given duties of investigation of facts. And in such matters, when war or threat of war in the nature of things no longer justifies action, the domestic jurisdiction of the disputant begins to raise its finger, and the consent to enter its territory may be honourably withheld by a disputant from a Commission of Inquiry. It is, therefore, vitally important to reserve for the Peace Commissions the single task of arranging a provisional peace, duties analagous to those of an armistice commission.

The advantage in the Greco-Bulgar case of securing the services of military attachés of States disinterested in the quarrel was very great. There are military attachés of

[1] See Chapters VI and VII, Part III, and see Appendix.

the Great Powers accredited to nearly every capital in Europe, and thus neutral officers resident somewhere near the region of conflict can always arrive on the scene within a few hours of an outbreak to carry out the Council's instructions. We have only to compare the delays that occurred in the Albanian case, or in the Polish-Lithuanian dispute, to realize the signal service rendered to the League by Sir Austen Chamberlain, the Rapporteur in the Greco-Bulgar case, in making use of the services of the attachés. For these officers, permanently stationed in various capitals in the service of individual States—members of the League, can in an emergency become temporarily the officers of the Council, and proceed to any desired region without loss of time.

* * * * * * *

To this array of measures which proved effective one should add other conditions of efficient action which were also realized in the successful cases, but which only become strikingly evident when we notice their absence in the cases of Corfu and Vilna.

(7) *The Council not the organ of a Super State.*

The Polish-Lithuanian dispute (up to the taking of Vilna) shows that the Council cannot be effective if the representatives of the Great Powers are not genuinely supported by their respective Governments, if one policy is pursued at the League, and another policy is pursued at the Foreign Offices of the Great Powers. The Council, not being a *deus ex machina* able to superimpose its will on the Governments, depends for its success, when it is a question of restoring peace, on the sincere co-operation of the great European Powers. That must be obvious. At such a time it is a question of being able to exercise political influence.

This was readily exercised in 1925, when France and Great Britain were represented on the Council by their Foreign Ministers, fresh from Locarno, working in close co-operation, and being Foreign Ministers their words

were a direct expression of their Government's will, subordinated, however, to the conditions inherent in the fact that each Minister was co-operating on the Council of the League, and subject to the rules of the Covenant. In the Greco-Bulgar dispute co-operation between M. Briand and Sir Austen Chamberlain, each Foreign Minister of his country, was close and effective, and their combined efforts in confronting Greece and Bulgaria with their obligations under the Covenant proved irresistible. Such was notably not the case in the Greco-Italian dispute. Relations between the two great European Powers on the Council, France and Great Britain (Germany was not yet a member), were at that time very strained on account of the occupation of the Ruhr by French troops: it was a period prior to Locarno, that fact lay at the root of the Council's failure to intervene when Italy took possession of Corfu.

Such then seem to be in practice the conditions of effective action on the part of the Council when it has to restore peace. It should be noted that nearly all the urgent cases involving hostilities were dealt with by a Council of which Germany was not yet a Member. Now that the Council has so considerably increased its political authority by the addition of the chief central European Power, its efficiency in preventing war will be so much the more increased. Cordial co-operation between France, Germany, and Great Britain at the Council table should be capable of preserving the peace at least of Europe. For it is obvious that when it is a question of exercising political influence, the Great Powers must necessarily play a paramount role; though this condition may not be very palatable to the small States, an inevitable fact it remains. On the other hand these three Powers at the Council table would act, not as the Concert of the nineteenth century, dominating by sheer might, but as three Powers representing the majority of the population of Europe, working within the limits of the Covenant, bound strictly by its terms,

authorized by it, and therefore subject to the requirement of a unanimous vote and dependent on the approval of the small States, members of the Council.

To such co-operation the Locarno Treaty brings its powerful aid, while the Kellogg Pact binds the Great Powers still further from resorting to war.[1]

[1] The reader is referred to Chapter VII, Part III, for a fuller discussion of the Council's capacity to safeguard peace, not only in regard to preventive action under Article XI, but also in regard to forestalling causes of war under Article XV.

PART III

DISPUTES LIKELY TO LEAD TO A RUPTURE

Conciliating the Disputants—the Council acts as a Conciliation Commission in accordance with the principles laid down in Article XV of the Covenant

I

THE OPENING DISCUSSIONS

Section I. THE APPLICATION OF ARTICLE XV

IN Part II were examined the activities of the Council acting as a peacemaker when its duty is solely confined to ending hostilities. In Part III an attempt is made to analyse the methods pursued by the Council to remove the causes which led or may lead to such outbreaks, and to remove them in such a way as to prevent a recurrence.

Having arranged a provisional peace, the Council can proceed more leisurely to a thorough investigation of the problem before it, and it will then apply the methods applicable to ordinary disputes, namely, those which do not immediately threaten war, but are 'likely to lead to a rupture'. Most of the disputes settled by the Council are of the latter kind—a proof of the vigilance of the members of the League in forestalling probable causes of war. It will be convenient, therefore, to consider in the same category both the second stage of an urgent dispute (in which a permanent settlement is attempted after hostilities have been ended) and the entire process of a non-urgent dispute (in which a permanent solution is proposed, although a rupture has not occurred). For on such occasions the Council follows the procedure laid down in Article XV, and does not act other than strictly as a mediatory body, a conciliation commission, using powers of suasion, and making recommendations which the Parties are free to reject without in general incurring any danger of compulsive action being afterwards taken by the Council.[1]

An ordinary dispute is generally referred to the Council under paragraph 2, Article XI, although there have been two cases of which the Council has been 'seised' in virtue of Article XV, paragraph 1. The circumstances which

[1] The nature of a final recommendation, together with the factors which induce its acceptance, is discussed in Chapter VI, Part III.

determine the choice of the Article have been discussed in Chapter 2 (Part I). The reference to Article XV in the two cases quoted was made by one of the disputants because of the unwillingness of the other disputant to submit the difference to the Council.

In all the other non-urgent cases, although there has been no initial reference to Article XV in the submission of a dispute to inquiry by the Council, the principles laid down in Article XV have been followed. In the Aaland dispute the practice was indeed formally recognized. When the question of method arose, Dr. Van Hamel, one of the legal advisers to the Council, declared that the Council 'was acting legally under paragraph 4 of Article IV, but in applying this Article it would have recourse to the principles laid down in Articles XV, XII, and XVII'.[1] Although the dispute had been referred to the Council in virtue of Article XI, paragraph 2, the Finnish representative relied from the outset on Article XV (in order to deny the competence of the Council he relied on paragraph 8, Article XV), and the other disputant, the Swedish representative, M. Branting, stated that the procedure of the Council should be governed by Articles XV and XVII, or in the last resort Article XI (meaning presumably Article XI, paragraph 1, under which if war threatens the Council takes any steps it may deem wise to maintain peace).

The examples discussed in the succeeding chapters of Part III will show how in most, if not all, cases the principles of Article XV became operative, although the Council has been in all but two cases 'seised' of the dispute in virtue of Article XI, paragraph 2. When the parties to the dispute send statements of their case, and all the relevant facts and papers to the Secretary-General, they are acting in accordance with Article XV, paragraph 2. When the Council proceeds to effect a successful settlement and makes public a report giving the facts and explanations thereto, it acts in accordance with paragraph 3, Article XV. When it fails to conciliate, and makes public its recom-

[1] Minutes of Council, July 10, 1920.

mendations, it acts in accordance with Article XV, paragraph 4; if its competence is questioned, the plea is based either on paragraph 1 or paragraph 8 of Article XV, and so on. In short, 'the procedure instituted under Article XI in no way implies the exclusion of procedure taken under other provisions of the Covenant.'[1]

Section 2. DEFINING THE ISSUES

The disputants, unless they are already Members of the Council, are invited to the table to take part in the deliberations just as if they were members. Their position at the table is significant; if they are already members, they occupy their usual seats; if they are not, they are given a place at each end of the semi-circular table; their position is not that of examinees subjected to a searching viva voce examination, still less is their role that of culprits facing their judges. In the mellifluous language of M. Briand they are given the opportunity of 'exchanging views before a friendly family tribunal', as 'members of the family of nations', though sometimes, as in less exalted families, the atmosphere is charged with domestic acerbity.

A discussion, almost informal in character, is at once engaged in on the invitation of the President, who calls on one of the disputants to put his case—usually the disputant who has referred the question to the League begins: even in the case of a dispute submitted by a third Party, e. g. Great Britain in the Aaland case, the British representative was not called upon to open the discussion, but it fell to the Swedish representative, M. Branting, to do so.

Each party states his case, and sometimes neither agrees as to the precise issue which the Council is to be asked to settle. This is not surprising, as the reference of the dispute has usually been made by one of the parties, or by a third party, without previous agreement between them as to the terms, which indeed are frequently of the vaguest character. To quote one example, Lord Curzon

[1] The Report of the Committee of the Council on Article XI. See Appendix.

submitted the dispute between Sweden and Finland in the briefest possible way, bringing 'before the attention of the Council the case of the Aaland Islands as a matter affecting international relations'.

In such circumstances the opening discussion at the Council table frequently lacks precision, and the President at this preliminary stage makes no attempt to interfere. The Council listens whilst the field of the trouble opens out before it. This informality has given rise to critical comments contrasting these 'loose methods of discussion' with the precision of an arbitration process, in which the issues in dispute are clearly defined in a written document —the *compromis*—agreed upon by the disputants before the arbitral process begins.

The critics forget that in an arbitration, the disputants may have engaged in long negotiations, extending, it may well be, over several weeks, in order to arrive at the *compromis* which authorizes the arbitral tribunal to act. The Council's task, on the other hand, begins at the Council table, and the first opening discussion enables it quickly to grasp the elements of the problem. Usually at the end of the first or second sitting, or at most the third, the issues between the disputants have become sufficiently clear to allow of definition, or of some precise statement which gives the Council an exact idea of its duties. Thus, a process which might take weeks in an ordinary arbitration or conciliation requires, in the case of the Council, one or two sittings.

Here the Rapporteur,[1] the member of the Council who

[1] The Rapporteur is the member of the Council who undertakes to follow the case in a more special and detailed way than his colleagues on the Council are able to do. As stated above, he studies the documents relating to the case, has private talks with the disputants and takes charge at the Council Meetings. It is difficult to think of an analogy; he is not an advocate for either party, nor a sort of judge; whilst the Council as a whole mediates in respect of the final solution, the Rapporteur mediates and adjusts differences at every step of the proceedings; he is the executive instrument of the Council for the purpose of the dispute, assisting his colleagues to exert their influence at the appropriate stages.

has been chosen to conduct the case, plays a very important part. He will probably have been told beforehand of his forthcoming duties, and will have had access to 'the statements of the case, with all the relevant facts and papers', which the disputants have to communicate to the Secretary-General in accordance with Article XV of the Covenant (paragraph 2).

Thus equipped, the Rapporteur can guide and clarify the discussion, focus the arguments on to the essential elements of the problem, and the preliminary task is achieved when at the next meeting, it may be, he reads a statement carefully prepared beforehand with the help of the Secretariat and frequently after a private consultation with the disputants; in this statement or Report, the duties of the Council are clearly set forth.

A striking example of the foregoing is furnished by the opening discussion in the Mosul case.[1] The first sitting[2] was devoted to an argument between Lord Parmoor, the British representative, and the Turkish representative, Fethi Bey, relating to the issues in dispute. Their views were widely divergent. Lord Parmoor held that the question submitted to the Council was to determine the northern boundary of the Mosul Vilayet, and thus to act on the assumption that the Mosul Vilayet was already part of the Iraq State and effectively under the British mandate. Fethi Bey held on the contrary that the question before the Council was whether the whole of the Vilayet of Mosul, or part of it, should or should not be in the possession of Turkey. The disputants were also at variance about procedure. Lord Parmoor stated that the Council's recommendation would be binding, as the Treaty of Lausanne, in his opinion, authorized the Council to give an arbitral award. The Turkish delegate dissented, contending that the 'decision of the Council would be

[1] Though referred to the Council in pursuance of the Treaty of Lausanne, and not in accordance with the articles of the Covenant, the methods were those normally employed by the Council.

[2] O. J., Sept. 20, 1924.

nothing more than a recommendation under Article XV of the Covenant'. These points were bandied to and fro while the Council listened and took no part in the discussion. But in the interval before the next sitting[1] M. Branting, the Rapporteur, had been at work and had drawn up a series of questions, a copy of which had been handed to the representatives of Great Britain and Turkey, and thus prepared the parties to the dispute were able to give their considered replies when the questions were put to them by the Rapporteur at a public session of the full Council.

The replies of the disputants brought the discussion a very appreciable step towards the required definition of the duties of the Council. For the British representative had made an important change of front. The Council was to retain 'complete freedom of action to rectify the existing frontier in any manner it may deem equitable after a full examination of local conditions'. For the rest, both disputants stuck to their points, the one claiming that the Council's decision was binding on both parties, the other dissenting.

After another argument, M. Branting felt obliged to adjourn the discussion 'to enable him to consider, in consultation with the parties, the preliminary question of the precise duties of the Council', and his success was such that at the next sitting he was able to announce agreement. The declaration which the parties had made to him in private, M. Branting caused to be repeated before the Council meeting in public session. The advantage offered by such machinery can be readily appreciated; here were two governments with seemingly irreconcilable views on the nature of the dispute, yet who, under the circumstances of a public meeting of the Council, feel compelled to give way and arrive at a rapid agreement on the task to be entrusted to the Council. Success would scarcely have come so readily under the old methods in cases where the parties were so much at variance about the substance, and were left to themselves to negotiate in

[1] O. J., Sept. 25, 1924.

private a *compromis*, on which the arbitral or conciliatory process would be based.

Another illustration is afforded by the Polish-Lithuanian case when the Council was first 'seised' of the question in 1920. At its first two sittings (September 16 and 17) the Council, after hearing the representatives of Poland and Lithuania, felt it could not proceed unless the subject-matter was more clearly defined. The disputants differed radically in their views of the issues. Poland charged Lithuania with supporting the Bolshevik offensive, and occupying territory provisionally allotted to Poland, west of the Curzon line; Lithuania at one moment asked the Council to find a permanent solution of the frontier question, at another moment to confine itself to investigating the false charges made by Poland, and so enabling the negotiations between Poland and Lithuania to continue with some chance of success at Kalvaryi. To put an end to this confusion, the President requested the rapporteur, M. Hymans, to act as mediator between the two parties and enable them to reach an agreement on the questions which they wished to bring before the Council. Private conversations took place, and at the next sitting of the Council, M. Hymans read a report which had been approved by both disputants, and which defined the Council's task as being limited to secure the evacuation by Lithuania of territory occupied west of the Curzon line, and the provisional acceptance by both Poland and Lithuania of the line of demarcation between their forces.

Often the Rapporteur does not intervene at so early a stage. The opening discussion may be sufficiently pointed and may scarcely need a preliminary definition or statement of the issues. But, even so, a precise statement does find a place at a later stage. For, in most cases, as we shall observe in the following chapters, the Council, in formulating its final settlements, depends on the help of special bodies, Commissions of Inquiry, and the like, or the Permanent Court at the Hague, and when passing a resolution authorizing the reference of the dispute, for the time being,

to such bodies, it is naturally obliged to define precisely the issues at stake. The Council fails very rarely to achieve this precision; the Yugoslav-Albanian case in its early stages (dealt with in Part II) shows that when the Council ignores this requirement, its handling of a dispute is most ineffective.

Section 3. CHOOSING THE MEANS OF SETTLEMENT

After listening to the opening arguments of the parties to the dispute, the Council does not as a rule proceed to examine the dispute, and issue its findings at the end of a meeting or a series of meetings, as a bench of judges would do.

The Members of the Council have many other tasks to perform at their sittings.[1] Moreover, the complexities of the dispute are often such that it would be quite impossible to propose a solution without a closer study than can be afforded by mere attendance at the Council table. The Members of the Council, who depend a great deal on the elucidations made by the Rapporteur after the opening discussion, look to him for a suggestion as to the best means of proceeding with the case; and his opinion will be based on the nature of the dispute, and the wishes of the parties. A wide choice, in fact, lies before the Council at this stage. It may seek the help of Commissions of Inquiry, specially appointed by it to investigate questions of fact in a disputed region, it may ask the Permanent Court of International Justice at the Hague to elucidate doubtful legal points. It may resort to what may be called its *direct* methods, relying on its own legal advisers, members of the Secretariat, or those attached to the Delegations for legal opinions, or on Committees of its own members—usually three in number—to submit solutions of the problem before it. It may request one of the members, the Rapporteur in the case, to conduct negotiations between the parties in some specially chosen city. To a discussion of these methods, the following chapters are devoted.

[1] Unless the Council meets in Extraordinary Session to deal with a threat of War. (See Part II.)

II

LEAGUE COMMISSIONS OF INQUIRY

Section I. THE MANNER OF APPOINTMENT

THE Council in effecting a settlement may seek the help of an outside body. If the dispute turns on questions of fact and the Council cannot rely on the statements of the parties, it may then be advisable to carry out an independent investigation, if necessary in the territories of the parties, or wherever the disputed region may be, and here we come to one of the most useful features of conciliation by the Council, namely, the use of Commissions of Inquiry. For the time being the Council delegates its task to a Committee of impartial persons, and authorizes them to present, for its consideration, a solution most fitted to meet the case.

Where Commissions of Inquiry have been set up to help the Council in the solution of any particular dispute, it will be observed that their reports have been adopted by the Council, subject to very slight modifications. A method which thus clearly exercises so decisive a role, deserves to be examined at length and in detail.

The idea is not new, though its realization is practically an innovation of the Council and marks a very creditable achievement. Commissions of Inquiry first find a place in international law in the Articles of the Hague Conventions of 1899 and 1907. The Hague Convention of 1907 lays down that the parties to a dispute 'should, as far as circumstances allow, institute an international Commission of Inquiry to facilitate a solution by elucidating the facts by means of an impartial and conscientious investigation'.

The field of inquiry was, however, severely restricted to 'differences of an international nature, which involved neither honour nor vital interests'—a surprising reservation when we consider that the Commission's report was binding on neither party. Again it is left to the disputants

to judge whether such a method would be suitable, 'as far as circumstances allow', and also the disputants are entirely responsible for setting up the Commission, choosing its members, defining its powers and settling its procedure, subject, however, to certain rules that should be common to all such Commissions prescribed by the Hague Convention—its proceedings are to be secret; it considers its decision in private; all questions are to be decided by a majority of the Commission; its report is to be limited to a statement of facts; bears in no way the character of an award, and leaves to the parties entire freedom as to the effect to be given to the statement. Such, in brief, was the institution viewed by the Hague Conferences.

The Dogger Bank crisis in 1905 furnished almost the only occasion on which these provisions were ever utilized. It may be recalled that on the French Government's recommendation, Russia and Great Britain agreed, after four weeks' negotiation, to the conditions regulating the appointment of a Commission of Inquiry. It consisted of one Russian and one British high naval officer, representing the disputants, two neutral officers, French and American, representing neutral Powers, and the fifth Commissioner to be chosen by these four, or if unable to agree, by the Emperor of Austria.[1]

The idea finds expression again in the so-called Bryan Treaties—bilateral agreements proposed by the United States in 1914—in which the scope of the inquiry is without restrictive reservation.

Again, provision for a Commission of Inquiry appears in the treaty of arbitration and conciliation concluded between the United States and France in 1928. The Commission viewed in both these bilateral treaties and by the Hague Conventions is distinguished by the fact that the choice of commissioners included two representatives

[1] In one important respect, the powers of the Dogger Bank Commission went beyond those provided by the Hague Conventions, namely, where it made a recommendation in addition to investigating the facts.

of the disputants and two neutral members, also chosen by the two parties, whilst the fifth member was selected by these four, and, failing them, by some neutral authority; likewise their powers and methods are settled by the parties themselves. The disputants thus choose the personnel, and determine the procedure.

In respect of Commissions of Inquiry set up by the Council of the League, we shall observe considerable differences which register a very great advance in their evolution. The Council has not laid down any guiding rules respecting their formation; no articles exist, similar to Articles 9 to 36 of the Hague Convention of 1907, prescribing how they should be set up. If we regard the practice of the Council, the absence of such regulations seems advantageous, because both in respect of powers and of personnel, the League's Commissions are superior in *conception* to those mentioned above; in *achievement* they stand alone, for the Dogger Bank case (1905) and a little known Commission which met in 1922 to inquire into the facts of a dispute between Germany and Holland arising from the former's submarine warfare activity, furnish the only precedents with which they can be compared.[1]

In five outstanding cases,[2] the Council's use of this method has been attended with great success. Two Commissions were charged with the problem of the attribution of territory—the Aaland Islands and the Mosul Vilayet; a third Commission with the task of creating an administration for a territory (Memel); the Albanian Commission, as we have already seen, had a mixed duty, supervising the withdrawal of troops in addition to inquiring into the facts of the dispute and proposing measures for preventing disturbances in the future; and to the fifth Commission in the Greco-Bulgar case, much superior in form to the Albanian Commission, were given the clearly

[1] *American Journal of International Law*, xvi, 1922, pp. 488–92.

[2] Disputes between: (1) Sweden and Finland, 1920; (2) Yugoslavia and Albania, 1921; (3) Allied Powers and Lithuania (Memel), 1923; (4) Great Britain and Turkey, 1923; (5) Greece and Bulgaria, 1925.

differentiated functions of investigation, peace having been arranged by a Military Commission. Fuller reference to the activities of typical Commissions will be made later.

Here one meets with the first of those characteristics which specially distinguish League Commissions of Inquiry. Although in three of these cases,[1] in setting up a Commission the Council responded to the suggestion made by one of the parties at the opening discussion, in the Aaland case (Sweden and Finland), the Commission of Inquiry (known at the time as the Rapporteurs' Commission) was suggested by the Council on the initiative of the Rapporteur, Mr. H. A. L. Fisher. That constitutes one advance on the Hague Conventions; the fact that a third party, in this case the Council, can at once propose to the disputants that a commission be set up. A second advance is even more noteworthy; in all cases the Council has exercised its initiative and relied on its own judgement of the requirements of the case in proposing the powers and duties, and choosing the personnel of the Commission, and the disputants are asked merely to approve these arrangements.

The personnel of the Commission *is thus selected by neutrals*, frequently the rapporteur acting in consultation with the President of the Council, and it *consists solely of neutrals*.[2] Unlike the Commissions set up in accordance with the Hague Conventions or those viewed by the Bryan Treaties, in no case have nationals of the disputant country been appointed to a League Commission of Inquiry. The latter may assist the Commission as assessors or experts, but in no single case are they allowed to be members of the Commission.

In the Mosul case, to give an example, the Council instructed its President and its Rapporteur on that question

[1] Albania demanded a Commission to inquire into the disturbances on the frontier in 1921; Bulgaria asked for a Commission to inquire into the circumstances of the Greek invasion in 1925, and Great Britain proposed a Commission as the best means of settling the Mosul question.

[2] See p. 142.

to appoint the members of the Commission (of Inquiry) by common agreement, and at a subsequent meeting of the Council, although the representative of Turkey was not present, the choice of the Rapporteur, M. Branting, and the President was announced simply giving the names of the nominees which the Council noted without discussion. Similarly in the Greco-Bulgar case, the Rapporteur, Sir Austen Chamberlain, in presenting his resolution to the Council setting up the Commission of Inquiry, proposed that the President of the Commission should be Sir Horace Rumbold, British Ambassador in Madrid, and in regard to the remaining members, contented himself with proposing that they should comprise one French and one Italian military officer, and a Dutch and Swedish civilian, without naming them. The disputants were merely asked by the President if they had any objections to any of the terms of the resolution of which the constitution of the Commission formed a part.

The Rapporteur again plays the leading role when the Council has to agree on the powers and duties of the Commission. In striking contrast with the case of Commissions viewed by the Hague Conventions and Bryan Treaties, the League Commissions were authorized to suggest a solution in addition to investigating the facts. The contrast is further shown in the fact that the League Commission's terms of reference are not arrived at by formal and exclusive agreement between the disputants. On the contrary the terms are proposed by the Rapporteur who has weighed the arguments and carefully noted the suggestions advanced by both parties in the opening discussions referred to in the previous chapter, and studied all the relevant documents which have previously been sent to the Secretary-General by the disputants. He is therefore in a position to judge impartially what the situation requires, and a great deal depends on his skill in inducing the disputants to agree to a plan. In the Mosul case, for example, the British and the Turkish representatives found themselves at an *impasse* on the question of

procedure. The Turkish representative insisted on recourse to a plebiscite, to which the British Government was firmly opposed, contending that the inhabitants were not sufficiently developed to be able to express an opinion, and asked for a Commission of Inquiry. M. Branting, the Rapporteur, found a clever way out of the difficulty. He met the views of both parties by proposing that the commission should be charged with a twofold task; (*a*) namely to discover whether a plebiscite was possible and practical, and (*b*) if this were not possible, it was itself to examine the question of substance. The task of the Rapporteur may be simple when he has merely to note the suggestion of the parties. For example, in the Greco-Bulgar case the Bulgarian representative had asked for (*a*) a Commission of Inquiry to investigate the facts on the spot and to fix the responsibility; (*b*) reparation for damage. The Greek representative equally insisted on reparation and payment of compensation, and the assessment formed an important part of the Commission's duties, as we shall see later.[1]

When the Rapporteur proceeds to advise the Council that a commission be set up and proposes its powers and duties, his views are formally embodied in a Report and Resolution. The Report outlines the factors in the dispute, states what needs to be settled, and by referring to the statements of the disputants shows how their consent is engaged in the proposed measures. The Resolution immediately follows, giving in the most careful and formal manner the powers and duties of the Commission.[2]

The Council relying on the wisdom of the Rapporteur does not usually discuss the Resolution. But before its formal adoption, the President invites the parties to make their comment, and state their objections, if any. In each of the cases in which Commissions of Inquiry have been set up, the approval of the parties was in this way specially sought. In the Greco-Bulgar case, for instance, the President, M. Briand, was not content with

[1] See p. 155. [2] See p. 156.

obtaining a general approval from the representative of Greece, he wanted to be assured that Greece approved of each of the three important duties of the Commission,[1] as the representative of Bulgaria had done, and he obtained that assurance.

Is the consent of the Parties necessary?

In setting up Commissions of Inquiry the Council has on each occasion obtained a unanimous vote, including the votes of the disputants. If the resort to a commission is regarded as a matter of procedure,[2] which may include, according to paragraph 2, Article V, of the Covenant, 'the appointment of Committees to investigate particular matters', the resolution 'may be decided by a majority of the members of the League represented at the meeting', (i.e. of the Council or of the Assembly).

But even so the votes of the disputants should be reckoned with the majority if the Commission is to operate in each of their territories. The Report of the Committee of the Council on Article XI in fact states that where there is no threat of war, 'it is understood that such a Commission cannot go to the territory of either party without the consent of the party to which the territory belongs'.[3]

This view would subject only certain movements of the Commission to the consent of the parties; for if one party permitted access to its territory and the other party refused a similar facility, the Commission could still be set up by the Council, and conduct its investigation in the territory of the former, and would not necessarily be precluded from passing judgement on questions affecting both parties. The Yugoslav-Albanian case (1921) shows this possibility. Although the decision setting up the Albanian Commission[4] was adopted by a unanimous vote inclusive

[1] See p. 156.

[2] In the Aaland Island case, M. Bourgeois (President) and M. Hymans, when referring to the question of setting up a Commission of Inquiry used the word 'procedure' several times.

[3] See Appendix.

[4] See p. 105.

of the parties, Albania and Yugoslavia, the representative of the latter agreed subject to a reservation which he wished included in the minutes, namely that his vote in favour of the proposal was based on the strict understanding that the Commission was not to operate in Yugoslavia. That condition was carefully observed by the Council and by the Commission, although it did not prevent the latter from passing an adverse judgement in its report on the policy of Yugoslavia in Albania.

In these circumstances it would surely be right to assume that if the objection of Yugoslavia had taken the form of a hostile vote, the Commission could still have been set up to proceed to Albania, with the latter's consent. This is as near as one can get to pointing out, from the practice of the Council, the possibility of taking a majority vote under Article V, paragraph 2, of the Covenant in setting up Commissions of Investigation.[1]

Usually, however, the *locus in quo* overlaps the frontier into the territories of both parties, and as the essence of a Commission of Inquiry is to investigate 'on the spot', it is desirable, whatever the legal requirements may be, to obtain the consent and co-operation of both parties if the Commission is to carry out its duties efficiently. The Council, as we have seen in the foregoing pages, has been fully aware of the need, and has succeeded in most cases in obtaining the co-operation of both parties.

Occasions when the Parties may be obliged to give facilities: Article XXIII, Covenant.

There are occasions, however, when it appears that the parties may be obliged under the Covenant to grant facilities to a Commission of Inquiry to enter their

[1] It should, however, be noted that a doubt exists in some circles as to whether the Council can decide *to set up* a Committee by a majority vote in accordance with the terms of Article 5, par. 2, of the Covenant, although no one doubts, in the light of the same paragraph, the Council's power to *choose the Members* of the Committee by a majority vote, once the decision to set up the Committee has been taken. The language of the paragraph is probably capable of this construction.

territories. The Polish-Lithuanian dispute in its later stages (1927–8) provides an example. Both parties had been advised by the Council (on December 10, 1927) to end the 'state of war', marked by their closed frontier, which had persisted since the taking of Vilna,[1] and agreed on the advice of the Council to open negotiations to prepare the way to a resumption of normal relations. These negotiations, continued for nine months, offered no prospect of success, and the frontier remained closed, when the Council, on the suggestion of Sir Austen Chamberlain,[2] decided to intervene at its October session (1928).

After deploring the long delay which marked the negotiations, the Council proceeded (on the report of the Rapporteur, M. Belaerts van Blokland) to express its view: 'As guardian of the general interest the Council can hardly be content passively to await the issue of events. If these negotiations make no appreciable progress, the Council would be failing in one of its essential duties if it allowed to continue indefinitely an abnormal state of affairs which might react most unfavourably, not only on the interests of the parties concerned, but also, and above all, on those of third parties.'

'In such a case the Council might order a very careful inquiry to be made into the difficulties which, in consequence of the Polish-Lithuanian dispute, injure the rights of third parties. This inquiry would be entrusted to experts, who would endeavour, if necessary by *making investigation on the spot*, and duly observant of the international agreements in force, to discover what practical steps could be taken. . . . These experts would submit their report to the Council, which would communicate it immediately to the parties concerned.'[3]

In presenting this report M. van Blokland declared that

[1] See Chapter II, Section 7, Part II. [2] O. J., July 1928, p. 896.

[3] O. J., Oct. 1928, p. 1494. It is difficult to see how such a step—the sending of a Commission to the territories of members without first obtaining their consent—can be justified under the Covenant, unless it is regarded as one of the conservatory measures taken under Article XI on the occasion of a threat of war.

'the right of the Council to deal with the interests of third parties seemed to him indispensable'. He need only refer to Article IV, paragraph 4, of the Covenant under which the Council might deal with any matter within the sphere of action of the League or affecting the peace of the world. He would place this provision of the Covenant besides Article XXIII, and he then proceeded to quote paragraph (*e*), which binds members of the League 'to make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connexion the special necessities of the regions devastated during the Great War of 1914–18 shall be borne in mind.'

Section 2. THE COMMISSIONS AT WORK

The choice of the personnel of the commissions of inquiry set up by the Council has always been confined to nationals of States which were not parties to the dispute and which were as completely disinterested in the settlement as they could possibly be.[1] As the Council gained in experience, one marks a tendency to appoint a personnel of higher rank. A commission will execute its task with all the more efficiency if its prestige and importance stand high in the estimation of the disputant Governments. The Greco-Bulgar Commission proved in this respect to be a great advance on the Albanian Commission. The latter comprised reputable citizens of their respective countries, a Major (Norway), a Colonel (Luxembourg), and a Professor (Finland): but the former included a British Ambassador of the front rank, a French and an Italian General, a Dutch Member of Parliament, and a Swedish diplomat.

The Commissioners are thus not chosen from a single profession. It is indeed advisable for many reasons to secure a varied personnel. Investigation of facts on the

[1] e.g. Memel case: the disputants were the Allied Powers and Lithuania, whilst the Commissioners were nationals of Sweden and Holland, and a citizen of the United States, who was chairman.

spot, whether relating to a violation of international obligations, or the question of the attribution of territory, is an intricate task requiring men trained in different professions; the technical skill of a soldier to judge whether a movement of troops was justified or not by the circumstances; the skill of a diplomat versed in international law and accustomed to deal with heads of Governments; the acumen of a Member of a Parliament accustomed to sense the wishes of a people; and finally the President should be some one whose name carries weight beyond the frontiers of his own country. These were the requirements satisfied by the Greco-Bulgar Commission, and which contributed so greatly to its success. The members of the first Commission of Inquiry set up by the League (in the Aaland Island case) were not perhaps so skilfully chosen, as they were mostly politicians and included a former Prime Minister (Belgian), a former President of the Swiss Confederation, and an Italian Senator who had frequently represented Italy on the Council—the U.S. representative excepted, who was formerly an Ambassador. Members solely of a particular profession would be apt to give too much room possibly to the play of professional bias. A commission consisting nearly all of politicians might give undue weight to arguments of political expediency. In the Aaland case, in fact, the Commission's Report put forward arguments which had been better left unstated. The settlement proposed was an excellent one, and did not require in addition to the sound reasons supporting it political arguments of very doubtful relevance.

It is advisable often to have more than three members of a commission. Excellent as was the Report of the Mosul Commission, its members failed to cover all the ground they conscientiously wished to do; they were, for example, not able thoroughly to investigate the Mosul boundary in the time allotted to them. They could only view it from afar in an aeroplane.[1]

[1] The Laidoner Commission (see p. 108) which went out later was able to establish the fact that the Brussels line was not a natural frontier.

The Rumbold Commission showed that five members are none too many for the purpose of effectively investigating the whole field of the trouble. In this case the task of the Commission had, moreover, been simplified by the fact that the three military attachés charged with supervising the peace arrangements had been asked by the Council to remain on the spot and establish as many facts as they could while the events were still fresh in peoples' minds. The region of the conflict was covered very effectively. The Commissioners divided themselves up into several sub-Commissions. The military members of the Commission, with the assistance of the military attachés, conducted a minute inquiry at Demir-Hissar (the frontier outposts between Greece and Bulgaria where firing had begun) and in Bulgarian territory into the frontier incidents and the advance of the Greek troops. The other sub-Commissions, consisting of the diplomats and politicians, aided by the Secretariat, held investigations in the towns and villages in the invaded region, chiefly to assess the damage caused by the invasion. Numbers contributed both to efficiency and to rapid work. The task of the Rumbold Commission took a little more than a fortnight, although it involved interviews with the Governments in Sofia and Athens in addition to investigations on the mountain frontier posts and over the entire region of the conflict covered by the Greek invasion, embracing a depth of eight kilometres into Bulgarian territory.

It goes without saying that these inquiries should be conducted under conditions that are not dressed up for the occasion; indeed where it has been found needful to ensure impartial, that is to say, normal or free conditions for the conduct of the inquiry, the necessary steps have been taken to obtain them. No better illustration can be found of the vigour and determination shown by the Commissioners to ensure impartial conduct than that offered by the Mosul Commission. The case is especially interesting because action had to be taken, not against Turkey, but against the representatives of Great Britain in

Iraq. Although the three Commissioners were nationals of small States (consisting of Count Teleki, a former Prime Minister of Hungary, M. de Wirsen, a Swedish diplomat, and Colonel Paulis of Belgium), they fortunately proved, as representatives of the League of Nations, more than a match for those of the British Empire in Iraq, and upheld the prestige and authority of the League with commendable dignity.

On arrival at Mosul, the Commissioners 'learned that persons who had demonstrated in favour of Turkey had been imprisoned. The members of the Commission themselves were under constant supervision. Two police patrols were stationed at the entrances to the Commission's quarters with instructions to note the coming and going of members and secretaries and to telephone immediately to the central police station of the city. Under these circumstances they came to the conclusion that no impartial inquiry was possible; they informed the British and Turkish assessors of this decision and stated that the Commission would not begin work until this state of affairs was brought to an end.' After eight days' delay, the Commission received entire satisfaction from the authorities and opened an inquiry at Mosul and heard witnesses; but during its sessions it received a telegram from the Prime Minister of Iraq protesting against the form of some of its questions. In its reply 'it upheld its right and affirmed it to be its duty to carry out, without let or hindrance, an exhaustive inquiry into all questions affecting the future of the country'.

Occasion arose for further protest when the Commission decided to break up into three sub-committees, spreading out their contacts with the population in order to ascertain its wishes in the completest and fairest manner. As the sub-committees were to investigate along three separate itineraries, *which were not to be announced in advance*, the British assessor strongly objected, and Sir Henry Dobbs, the British High Commissioner, came post haste from Bagdad to reinforce his agent's objection.

A very piquant argument took place between the President of the Commission, M. de Wirsen, and Sir Henry Dobbs. The honours of the discussion certainly went to the former. Sir Henry Dobbs based his objections on the plea of the difficulty of maintaining law and order, and of maintaining the prestige of the British Government, 'the questions put by the Commission . . . suggesting that the Commission was looking for evidence against the existing administration; . . . he suggested that public opinion should be consulted through the local authorities'. The President (the Swedish diplomat) replied that the Commission would pursue the inquiry quite freely as its duty dictated. In any case, the procedure followed by the Commission would be set forth in a report to the Council of the League of Nations. He concluded by pointing out that the Commission's work had been hampered to a certain extent by the unjustifiable action of the police, not only against the witnesses who had been called but also against the Commission itself.

Speaking as a jurist, Count Teleki (Hungary) pointed out that Iraq legislation could only be enforced in the disputed territory, so far as it related to the administration of the country, and the maintenance of order. In regard to matters connected with the sovereignty of the country, it was not applicable.[1]

Sir Henry Dobbs made a final attempt to gain his point, but only succeeded in bringing upon himself a rebuke. He said that the nationalities of the members of the Commission would suggest that in selecting them the Council had endeavoured to establish 'a well-balanced equilibrium'. He objected to the Commission's decision to make separate inquiries in different parts of the vilayet, because he was

[1] This view (to which the Commissioners gave fuller expression in the Report to the Council)—namely that 'a district of which a State has lost actual possession remains in international law an integral part of the territory of that State and subject to that State's "legal sovereignty" until that State renounces its rights'—is in the opinion of Sir John Fischer Williams doubtful legal doctrine, and it is held that Count Teleki in this respect went outside his reference (*British Year Book of International Law*, 1926, p. 26).

afraid that his Government and public opinion in England might be led to imagine that the nationality of the individual members of the Commission would not be without some respective influence on their conclusions.

The President, speaking for himself and for his colleagues, felt that he must at once call attention to the inexpediency of this remark. He replied that this was a question of confidence; that the Council had unanimously selected the members of the Commission and had left them complete freedom to settle their own procedure; and that while criticisms might have been passed by the representatives of the countries concerned in the presence of the Council at the time of its decision, they seemed misplaced at the present stage of the Commission's work. He added that if this question were to be reopened, serious consequences might ensue. This stern rebuke ended the difficulties experienced by the Commission. Henceforward they carried out their investigations as they desired under impartial and free conditions.

In all cases the Commission of Inquiry have been able to exercise their authority within the limits set them by the resolutions of the Council. By all five Commissions personal contact was established not only with the disputant governments and local authorities, but with representatives of all classes of the population, whether it was a question of allocating territory, as in the case of Mosul and the Aaland Islands, or of assessing damages or removing causes of trouble, as in the case of the Albanian and Rumbold Commissions.[1]

Section 3. THREE TYPICAL REPORTS OF THE COMMISSIONS OF INQUIRY

A brief glance at some of the Reports of the Commissions of Inquiry should serve to indicate how completely

[1] The assistance of the permanent staff of the Geneva Secretariat should not be under-estimated. Two or three secretaries (not nationals of the disputant countries) were attached to each Commission to give valuable help in drafting Reports as well as in the task of actual investigation.

the task of solving the problem submitted to the League has in effect been placed in the hands of the Commissioners by the Council. It should reveal the principles which guide the Commissions in their investigations and show whether political expediency plays a great part, by which one means the factor which weights the scales in favour of the party with the big battalions or with a more threatening voice than its rival; or whether by a rigidly objective examination of the facts the Commissioners attempt a just balance of the opposing claims.

If the latter, then we must extend our conception of conciliation as practised by the Council of the League; for by its powers of delegation to a neutral Committee (i.e. a Committee of which the parties cannot be members), the Council's function as a conciliation commission develops into a quasi-judicial process, in which the role of the parties is limited to supplying facts and information, and allows them no share in formulating conclusions. Such considerations as these may serve as the touchstone of our sense of the merits and demerits of the Reports.

The Mosul Report.

In every case the League Inquiry Reports are exhaustive documents far exceeding in scope their unique predecessor, the Report of the Dogger Bank Inquiry which merely gave bare conclusions. Two of the Reports illustrate ways of deciding attributions of territory (the Mosul and Aaland Island cases), a third fixes responsibility for aggression (Greco-Bulgar case, 1925). As a model of scientific investigation, of clear analysis of an extremely difficult subject, of careful relation of values, and balance of argument, of freedom from political bias, the Report of the Mosul [1] Commission with its maps, graphs, and statistics would be difficult to surpass. Their method ensured that ascertainable facts formed the sole criterion with which they judged the claims of the rival parties, Great Britain and Turkey. These facts, the Commission divided into categories—

[1] See pp. 70, 129.

geographical, ethnic, historical, economic, strategical, culminating in the most important group—the ascertained wishes of the population in the disputed region. Each group supplied a rigidly objective test in which the facts spoke for themselves.

Beginning with the geographical test, the three Commissioners [1] found that the facts did not rule out either of the claims: the northern frontier claimed by the British and the southern one claimed by Turkey were equally possible; the ethnic test was equally non-committal 'so great was the confusion of races in the disputed territory', the majority of the population consisting of Kurds and the rest comprised Arabs, Christian Turks, Yezides, and Jews, in that order of numerical importance; both the historic and economic test favoured inclusion with Iraq: the strategic test also favoured the British claim, the Turkish proposed frontier being 'bad' in this respect.

The impartiality of the Commissioners is pre-eminently shown in the final test—the ascertained wishes of the population—of which the following is a quotation:

> Taking the territory as a whole, the desires expressed by the population are more in favour of Iraq than of Turkey.
>
> The attitude of most of the people was influenced by the desire for effective support under the mandate and by economic considerations rather than by any feeling of solidarity with the Arab kingdom: if these two factors had carried no weight with the people consulted, it is probable that the majority would have preferred to return to Turkey rather than to be attached to Iraq.
>
> Though it is fair to say that the pro-Iraq sentiments are somewhat tepid, there can be at the same time no doubt that the Turkish Government's assertions to the effect that the majority of the people of the Vilayet of Mosul are indisputably anxious to return to Turkey, are incorrect.

The Commission's task is not completed with this careful elucidation of the facts on which the Council could, if it wished, proceed to form its own conclusions. In no case

[1] M. de Wirsen (a Swedish diplomat, President), Count Teleki (ex-Hungarian Prime Minister and a jurist), Colonel Paulis (Belgium).

are the duties of any of the League Commissions of Inquiry completed at that stage. In every case the Commissions themselves proceed to suggest solutions based on the facts.

The conclusions of the Mosul Report are distinguished from those of other Reports by the fact that it submitted to the Council two alternative solutions consistent with the ascertained facts: (1) the Mosul Vilayet as a whole was to be included in the Iraq State provided the territory remained for twenty-five years under 'an effective mandate of the League of Nations', but (2) if the League of Nations control were to terminate, it would be more advantageous for the territory to remain[1] under the sovereignty of Turkey, whose internal conditions are incomparably more stable than those of Iraq'.

Apart from its disputable legal doctrine, which, however, did not affect its conclusions based on the facts, no report could have been more impartially conceived; its authors did not deviate by a hair's breadth from their notion of what was just and equitable to the populations concerned. No other report was more studiously indifferent to the views which either party, in this case Great Britain or Turkey, were likely to entertain of it.

The Aaland Island Report.

The Report of the Commission of Inquiry[2] in the Aaland Islands case was not so free from considerations of 'political expediency'. Its political character was all the more marked as it followed a finding drawn up by three jurists on the question of the competence of the Council to deal with the dispute, Finland having questioned the Council's right of intervention on the plea that the Aaland Islands were part of Finnish territory, and came under her sovereignty, and therefore the claims of the islanders constituted a matter of domestic jurisdiction.[3] In seeking to

[1] The words 'remain under the sovereignty of Turkey' imply a legal view which is much disputed (see Sir John Fischer Williams, 'Sovereignty, Seisin and the League', *British Year Book of International Law*, 1926).

[2] Known as the Committee of Rapporteurs.

[3] See p. 214, for meaning of 'domestic jurisdiction'.

establish the competence of the Council, the jurists argued that Finland's sovereignty was doubtful and obscure—it was a State undergoing transformation, detaching itself from Russia during the Revolution of 1917—when the Aalanders were making their claims. Finland had not yet acquired the character of a 'definitely constituted State', and they concluded that the dispute did not refer to a question left by International Law to the domestic jurisdiction of Finland.

The jurists' report, therefore, turned on the question of the sovereignty of Finland, which they declared to be doubtful. The Rapporteurs in their turn, after an exhaustive inquiry, equally pivoted their report on the question of Finland's sovereignty, but they came to precisely the opposite conclusion: the argument on which they chiefly relied in proposing that the Aaland Islands be retained by Finland was precisely the legal one that Finland's sovereignty over the islands was, in their view, unquestionable.

It was an unusual situation: the legal experts in declaring that the Council was competent cast doubts on the sovereignty of Finland; the political rapporteurs, in proposing their solution, relied on the legal argument which the legal experts had found doubtful. Here we have an example of the same set of facts being interpreted differently: the politicians in one sense; the lawyers in the opposite sense. The facts in question related to the historical part of the inquiry: the status of Finland in the nineteenth century as part of the Russian Empire; and its status during the transition stage of the Russian Revolution.

The Rapporteurs were convinced by the historical facts that the Finnish State had a continuous history from 1809 (when the Aaland Islands and Finland were annexed by Russia) as an autonomous State until 1917–18, and that status it retained through the period of the revolution; and when it became independent 'the only change was the extinction of the bonds with Russia. Thus a new régime

was created, but not a new State, without the loss of a yard of the national territory to another Power.' They proceeded to show, arguing on this assumption, that the right of sovereignty of the Finnish State over the Aaland Islands was, in their view, 'incontestable, and their present legal status is that they form part of Finland'.

In their solution the Rapporteurs provided the Aalanders with a very large autonomy, and generous minority rights, such as have been given to few in any part of Europe. This they could have proposed without establishing that Finland was already sovereign. In the Jurists' Report they could have read that during a transition stage, when States are transforming themselves, although the principle of self-determination then comes into play, involving 'the right of choice between two existing States, this principle, however, must be brought into line with that of the protection of minorities . . . and that geographical, economic, and other similar considerations may put obstacles in the way of its complete recognition under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conceptions and may even be dictated by the interests of peace'.

To establish Finland's sovereignty over the Aalanders as a continuous historical fact had other inconveniences besides contradicting the arguments of the jurists. If Finland is sovereign, does not the question become a domestic one? On what grounds do the Rapporteurs propose to proceed with the question and suggest the considerable limitation to Finnish sovereignty which, in fact, their solution required?

They obviously felt this dilemma. For they state in the Report, 'The inquiry which we have made has given us the absolute conviction that the only method to adopt . . . is to entrust the solution of the question to impartial examination by the Council. It is therefore within its rights in declaring its competence. Although we cannot share the opinion stated by the Commission on all points,

we agree with their declaration that the Aaland question extends beyond the sphere of domestic policy. But in our opinion it is because it had acquired such considerable international importance that it was necessary to submit it to the high authority which the League represents in the eyes of the world. . . .'

These are vague words which are not sufficient to show that the question 'extends beyond the sphere of domestic policy', and should be contrasted with the opinion of the jurists which rejected the notion 'that the fact that a dispute was brought before the Council by a Member of the League of Nations would suffice to invest it with an international character and make it therefore subject to the jurisdiction of the League within the meaning and application of paragraph 4 and following paragraphs of Article XV (i.e. to proceed to a settlement) . . . a question is either of an international nature or belongs to the domestic jurisdiction of a State, according to its intrinsic and special characteristics'.[1]

Having declared, notwithstanding these views, that Finland was 'unquestionably' sovereign over the islands, the Commissioners decided that the demand of the Aalanders for a plebiscite could not be granted, although they handsomely recognized the fact that the islanders were overwhelmingly in favour of adoption by Sweden.

Apart from their reliance on the view that Finland was sovereign over the Islands—a view which, as we have just seen, was far from being 'unquestionably' established—the Commissioners' main grounds for their conclusions were political and geographical. The Aalanders, who numbered not more than 27,000 people, were only a part of 350,000 Swedes inhabiting the western mainland of Finland, and 'these were strongly pronounced against the separation of the Islands', on the ground that it would make their relations with their compatriots the Finns more difficult. If

[1] Great weight was attached to this opinion some time afterwards by no less an authority than the Permanent Court of International Justice (see Tunis Nationality Decree case, Chapter V, Part III).

Aaland were ceded to Sweden, 'the bitter resentment of the latter would be swift to change to hatred, both against their fellow-citizens of Swedish stock and against the Swedes of the Kingdom. The Finns are vindictive and their vengeance would turn first of all on their unfortunate associates . . . it would sow the seeds of irritation and rancour in the hearts of the Finnish majority, which might perhaps drive the Republic into political combinations and alliances directed against Sweden'. This consideration, we are obliged to feel, weighted down the scales in the Rapporteurs' minds. One of the parties to the dispute felt so keenly about the question, that the consequences of frustrating its wishes would imperil peaceful relations between the Scandinavian States, and upset the internal harmony of Finland itself. Believing this, the Rapporteurs proposed a solution in which political considerations outweighed the complete fulfilment of the wishes of the population concerned.

It was unnecessary to add political reasons of a more doubtful character to the effect that Finland having repelled 'Bolshevist Communism after a bloody struggle, it would be an extraordinary form of gratitude to despoil her of territory to which she attaches the greatest value'.

Whilst Finland's sovereignty was proposed to extend over the Islands, it was to be very seriously limited: 'primary education in Swedish ought to take the form of obligatory exclusion of Finnish, confirmed by law'; other measures were proposed to prevent Finnish economic penetration: all designed to strengthen the autonomous régime already accorded by Finland. In case of disputes the General Council of Aaland was to have the right of recourse to the Council of the League.[1]

This report, having the same object as the Mosul Report —the attribution of territory—unlike the latter, has to take account not only of 'objective' tests, geographical,

[1] The Report also provided for an international agreement for the non-fortification and neutralization of the Aaland Archipelago, replacing the Convention of 1856.

ethnic, strategic, and the wishes of the inhabitants, all of which one may regard as conditioning a just settlement, but also extraneous factors of a political nature—the feared hostility of one of the parties to a given solution.

To take account of such a factor is, of course, an essential duty of a body of conciliators, and it is interesting to note that the first League Commission of Inquiry feels obliged in order to secure a settlement to give a large place to such political considerations and the need to placate one of the parties. But, even so, the peace proposed must not be far removed from justice: care must be taken to hold the balance; otherwise a Commission might become a mere expression of the will of the more stubborn party. The Aaland Commission supremely achieved that balance in proposing the very serious limitation of sovereignty to be exercised over the Islands by Finland—a limitation designed to perpetuate the Swedish nationality of the inhabitants. Indeed, the Report went so far as to say that if Finland refused these guarantees 'the interests of the Aalanders and the interests of a durable peace in the Baltic, would then force us to advise the separation of the islands from Finland, based on the wishes of the inhabitants . . . which would be freely expressed by plebiscite.'

The Rumbold Commission: how the Council dealt with an 'aggressor'.

The Report of the Commission set up to inquire into the causes of the Greco-Bulgar dispute in 1925[1] offers a third type of Inquiry and is of special interest because its task was to attribute blame for an outbreak of hostilities culminating in invasion, and to recommend the amount of reparation to be made by the guilty party. The case offers a unique example of the methods which the Council has employed in determining which of two parties had violated the Covenant in resorting to arms—which of them, to use a much-abused word, was the 'aggressor'. This problem, which in the abstract has baffled theorists, the Council

[1] See also p. 48.

succeeded in solving by a careful examination, undertaken on its behalf by a special Commission, of the circumstances of the particular case. The Members of the Commission, consisting, as we observed earlier, of a British ambassador, a Swedish diplomat, a Dutch Member of Parliament, a French and Italian General, contributed the varied skill of their professions to their delicate task. Their inquiry involved the elucidation of many intricate factors, before they could finally attribute responsibility; not only the circumstances and causes of the original firing incident in the lonely mountain-pass between the Greek and Bulgarian sentries; but the conditions under which the Greek and Bulgarian Governments acted in summoning reinforcements; whether, for instance, their intentions were to make war or execute a 'policing' operation.

Their examination was conducted with the co-operation of the parties after peace had been restored. We have already noted in Part II the significance of the fact that in order to end hostilities, the Council had not to concern itself with determining the guilty party and then to take measures against him, but proceeded without delay to separate the combatants. Here we may observe another advantage of the Council's methods; it was not in the least handicapped by the want of a general definition of aggression; indeed, no simple formula would have enabled the Commissioners to dispense with the elaborate investigations that they undertook; the case demanded, as such cases must always demand, a special examination of the circumstances on their particular merits.

The Commission's duties [1] were not confined to investigating the origins of the outbreak and fixing the responsi-

[1] Resolution of the Council, Oct. 29, 1925, authorized the Commission to make (1) a 'full inquiry into the recent incidents on the frontier between Bulgaria and Greece to the north-east of Salonica and to ascertain as exactly as possible the origin of these incidents, and all the facts in relation thereto which have given rise to the intervention of the Council.' (2) 'The Commission shall in particular establish the facts enabling the responsibility to be fixed, and supply the necessary material for the determination of any indemnities or reparation which may be considered appropriate' . . .

bility; they included an inquiry into the means of eliminating such disturbances in the future. The duties of the Commissioners were, in fact, threefold:

(1) the investigation of the facts of the outbreak (detective work);
(2) fixing responsibility on the evidence and assessing damages due from the guilty party (judicial work);
(3) proposing measures to eliminate disturbances in future (the work of an executive government).

The two parties, Bulgaria and Greece, had not only approved these powers but had asked that the Commission be provided with them, and the Rapporteur, Sir Austen Chamberlain, when presenting his Report and resolution, repeatedly laid stress on the fact that their consent had been given in advance.

The technical aspect of the inquiry established very convincingly, by a simple narration of the facts, that the responsibility for the invasion lay solely with Greece. The origin of the outbreak was insignificant—a quarrel between a Greek and Bulgarian sentry on a lonely mountain outpost. The Report shows how the trouble spread from the outposts to the reserves in the rear, and how the sending of distorted information to Athens led to the invasion of Bulgaria by two Greek army corps on the instruction of the Greek Government, although the original firing at Demir Kapu was already dying down. Cavalry, artillery, and infantry, aided by aeroplane reconnaissances, advanced a depth of eight kilometres northwards into Bulgaria, on a front also of eight kilometres, with orders to take Petritch.

It shows how Bulgaria, relying on the League's efficacy to intervene, ordered her troops 'to make only slight resistance', and after M. Briand's intervention (see p. 36)

and (3) suggest 'measures which would eliminate or minimize the general causes of such incidents and prevent their recurrence'.

The Commission was authorized to fix definitely the amount of compensation for any loss of movable property so as 'to prevent any dispute as to the right to, or amount of, such compensation'.

issued the following order: 'Should the Greeks attack, our troops will abstain from all resistance', a phrase which brings out the dramatic quality of Bulgaria's confidence in the League. 'Throughout the operations', states the Report, 'the Bulgarian artillery did not fire a shot'. The guns were silent in face of the advance of the enemy because the Council of the League was intervening. A momentous and inspiring incident in the history of the League's activities.

In estimating the intention of both parties, the Commission stated that there was no premeditation on either side, and that the Greek Government intended to carry out 'a policing operation', but concluded its first task with the following words, 'these facts notwithstanding, the Commission is of opinion that the operations carried out by the Greek troops were not technically justified'.

The Commission did not leave to the Council the duty of expressing the opinion whether in the circumstances Greece had violated the Covenant and should make reparation to Bulgaria. It proceeded itself to exercise this judicial function. It first cleared Bulgaria of any guilt. The Commissioners considered that the Bulgarian Government had acted in conformity with the Covenant of the League, but with regard to the Greek Government, considered that 'by occupying a part of Bulgarian territory with its military forces, Greece had violated the Covenant of the League of Nations'. The great importance of this statement in regard to the development of the jurisprudence of the League has been discussed in the section dealing with the Corfu case (p. 85).

The Commission proceeded to declare the opinion that the Greek claim to an indemnity in order to compensate the families of soldiers killed and wounded, and to pay for the cost incurred in food and transport by the Greek army, should be disallowed (except for one item, the death of a Greek officer carrying a white flag), and that the 'Greek Government is responsible for the expenses, losses, and sufferings caused to the Bulgarian people and the

Government by the invasion of Greek troops, and on this account should make reparation to Bulgaria'.[1]

This duty of the Commission, namely, itself to pass judgement and to recommend damages, was an interesting innovation. It will be remembered that in the dispute between Greece and Italy in 1923 (Corfu) the Council proposed a Commission to inquire into the circumstances of the Tellini murders, and any reparation due from Greece was to be fixed by the Permanent Court of International Justice on the basis of the facts ascertained by the Commission. The plan was not eventually followed, but the Council in proposing it was presumably acting in accordance with the principle of Article XIII of the Covenant, which states that 'disputes as to the extent and nature of the reparation to be made for any breach of an international obligation are declared to be among those which are generally suitable for submission to arbitration or judicial settlement'.

In the Greco-Bulgar case the Council preferred on practical grounds to let the Commission of Inquiry perform the task of attributing responsibility and assessing damages, in addition to investigating the facts: in other words, it performed a duty suitable to an arbitral or judicial tribunal. Indeed, when the Report was considered by the Council, the Greek representative objected to the Commission giving what he termed 'legal opinions'. The Council alone, he held, was competent to express an opinion on these points, namely, the question of violation of the Covenant and the amount of reparation. He did not persist, however, in his objections as he was reminded by the Council that he had given his consent in advance

[1] The Commission fixed definitively—as they were empowered to do by the Council—the compensation to be paid to Bulgaria for the loss in movable property, cattle, furniture, destruction of crops, and so forth, at 20 million levas, but recommended that an addition of 10 million levas be paid for material and moral damage for loss of life (nearly a score of Bulgarian soldiers and civilians fell in the struggle), loss of working days, and the moral sufferings of 3,500 people who temporarily abandoned their homes.

to the procedure, and the Commission had acted in accordance with its instructions.

The third duty of the Commission—a duty of a governmental kind—was to propose measures to prevent frontier incidents in the future. These were of two kinds: military measures to supervise frontier guard arrangements under the control of two neutral officers to be appointed by the Council, and political measures to remove the grievances of the Greek and Bulgar populations which had been exchanged under a special convention. These measures, being of local interest, do not require elaboration here.

The Commission, in short, fulfilled its triple duty of investigation, judicial decision, and constructive statesmanship. Unlike the Aaland Island Report, it was not confined to an outline of a settlement; all the details were worked out and the Council, as we shall observe later, accepted its conclusions with one or two insignificant modifications. In fact the task of clearing up the situation had been completely transferred by the Council to this expert non-political body, and the completeness of the duties accorded to the latter registers the greatest advance so far achieved in the theory and practice of Commissions of Inquiry.

The progress was indeed marked: in 1921, only four years earlier, the Yugoslav-Albanian Commission had duties restricted to investigating the cause of the invasion of Albania. It was not charged with the duty of apportioning blame and proposing reparation for the injured party. The Council was content to obtain an assurance from the Serb Government that it would withdraw its troops, and no one proposed that reparation should be made for laying waste a large part of Albania.

Section 4. THE INQUIRY REPORT BEFORE THE COUNCIL

On the completion of a report, it is circulated to the regular members of the Council, in some cases before it is communicated to the disputants, and possibly suggestions may be made informally by an interested Government

(although not a party to the dispute) inviting the Commissioners to present their Report in a slightly altered form. There is no evidence that States-members have resorted to this practice: but it is extremely undesirable to allow an opening for possible abuse: obviously the Report as presented to the Council should represent the bona fide opinions of the Commission. In the Greco-Bulgar case the procedure was reversed; the Report was forwarded in the first instance to the disputant governments, who were 'requested to keep the report secret until the Council met, since, contrary to established procedure, the Report had been communicated to them before it had been forwarded to the regular members of the Council, owing to the exceptional urgency of the case'. It is surely desirable that as far as possible the Report should be circulated to the Members and the parties to the dispute simultaneously.

When the Report is presented to the Council, which, of course, includes the disputants, its mediatory duties are far from being at an end. Exhaustive and impartial as the Report may be, it is purely advisory, although its presentation in such circumstances invests it with an authority that no other form of mediation could give it. To appreciate to the full the advantages of the League's system of mediation, we have only to recall the poverty of resource of the old methods. The Dogger Bank Commission, to take the only well-known instance, communicated its report in secret to the disputant Governments in London and St. Petersburg: the latter were left without any further mediatory factors, or the restraining influence of neutral opinion, to consider in the secrecy of their Foreign Offices what attitude to take, whilst the Commission's findings, of course, could not be published without their consent. If the disputants still found themselves in disagreement, there was no third party immediately at hand ready to induce a more conciliatory frame of mind.

The Council's methods afford a rich contrast. The Report is brought before the Council—that is, a Council of

neutral Governments—and the disputants are invited to state their attitude in public. The parties are less likely to be unreasonably obstinate in face of the Commission's proposals under such conditions. The power of public opinion plays an effective part at this stage of the conciliatory process. The parties express their views, after which the Council proceeds to secure their acceptance of the Report. In the Aaland case, the Council relied, at that youthful stage of its career, on its own meetings—held mostly in private after the first open discussion of the Inquiry Report—in order itself to mediate at every step of the proceedings.

In later cases the Council dispensed with this necessity. After the first invariable step of open discussion of the Report before the whole Council, it was usual for a Committee of the Council, consisting of the Rapporteur and two others, to take the disputants on one side and discuss the Report with them (sometimes, as in the Greco-Bulgar case, in the presence of the members of the Commission of Inquiry) and to arrive at a final agreement which could be presented to the Council.[1]

Obviously the conclusions of three members of the Council, based on the Report and on discussions with the parties, are not likely to be called in question by the rest of the Council, which, as in the Greco-Bulgar case, therefore proceeds formally to adopt them with the approval of the parties.

[1] When, for instance, in the Greco-Bulgar case, the disputants had expressed their views on the Rumbold Report—the Bulgarian representative approving and the Greek representative raising constitutional objections—the Rapporteur, without further discussion, proposed the next step, namely, that the Council should give him the assistance of two colleagues 'for the consideration of the Report of the Commission and of the statements which had been made by the representatives of the two parties on the incident. The consequences which the decision of the Council might have for what might be called the jurisprudence of the League of Nations was so important that he would be glad if he might have the assistance of his colleagues in preparing a report for the Council, so that the whole responsibility should not be his.' (See p. 87.)

In the Aaland Island dispute, the Rapporteur, having failed to secure the approval of the Swedish representative (there was no Committee of the Council in that case), felt nevertheless that he could bring the Inquiry Report once again before the Council in the hope that the opposition would be withdrawn at the Council table, and this in fact took place.

In the Mosul dispute, the Committee of three, deputed to consider the Inquiry Report with the parties, met with more stubborn opposition from one of them—Turkey. After private deliberations lasting over a fortnight, the Committee proposed to the Council another expedient, namely, to seek the help of the Permanent Court of International Justice on the question which was impeding progress. The question was whether the Council's final decision was binding in virtue of the Treaty of Lausanne.[1] It is interesting to note that even although the Court advised that the Council's decision was binding, the latter body preferred to continue to use its power of mediation and delegate to its Committee of three the task of persuading the parties to negotiate on the basis of the Inquiry Report; but its efforts of pure mediation proved vain, and it finally proceeded in the absence of Turkey to give its arbitral award. Here it is sufficient to observe that in order to secure acceptance of the Inquiry Report, the Council had brought into play all the expedients of mediation at its command—the Rapporteur, the Committee of three, public meetings of the whole Council, advisory opinion of the Court; we may also add the report of an extra commission, the Laidoner Commission,[2] whose reports of the ill-treatment of the Assyrians by the Turks influenced the Council in deciding unanimously on one of the two solutions proposed by the Inquiry Commission.[3]

The varied resource at the Council's command is thus manifest, and must give in most cases an almost irresistible authority to a Report of a Commission of Inquiry, whose conclusions the parties must find difficult to reject.

[1] See p. 130. [2] See p. 108. [3] See p. 150.

III

ADVISORY OPINIONS

Section I. SETTLEMENTS BASED ON THE ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

IN the last chapter we saw how the Council entrusted to an outside body specially appointed by it the task of proposing a settlement of certain disputes. Parallel with this quasi-judicial method of reference to Commissions of Inquiry may be placed the reliance of the Council on the help of the Permanent Court of International Justice in solving certain disputes referred to it in virtue of Article XI or XV of the Covenant.[1] In such cases the Council makes a request to the Court for an advisory opinion in accordance with Article XIV of the Covenant. 'The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.' This Article places no limits on the kind of questions on which an opinion is needed, and the Council, in fact, has frequently resorted to the method in questions which did not concern two sovereign states, but were more of the nature of administrative difficulties.

It is within the scope of this work to deal only with the methods employed by the Council in settling disputes in

[1] The Council has requested an advisory opinion in the following disputes referred to it in pursuance of Articles XI or XV of the Covenant:

1. The frontier dispute between Poland and Czecho-Slovakia (Jaworzina), 1923. (Question of Substance.)

2. Eastern Carelia: Finland and Russia, 1923. (Substance.)

3. The frontier dispute between Yugoslavia and Albania (Monastery of St. Naoum), June, 1924. (Substance.)

4. The dispute between Greece and Turkey relating to the compulsory exchange of their nationals, 1924. (Substance.)

5. France and Great Britain (Tunis Nationality Decree, 1922). (Question of competence.)

6. Turkey and Greece (Expulsion of the Oecumenical Patriarch). (Question of competence.) 1925.

7. Greece and Turkey. (Mixed Commissioners' duties), June 1928. (Substance.)

pursuance of the Articles of the Covenant, and it would be unprofitable to dwell on the conditions governing its requests for advisory opinions in other circumstances,[1] unless, as in the Mosul case, they had some special bearing on its procedure under the Covenant. What is of importance in this study is to observe the extent to which the Council relies more or less completely on the opinion of the Court, particularly if it bears on a question of substance.

If the reliance on the Court's opinion is complete, and if that opinion bears on the substance of the dispute, a method of settlement which in form is by way of conciliation might often in practice be justly regarded as equivalent to judicial settlement; although the Court's opinion is in form purely advisory, which the Council need not accept if it wishes, it is important to observe from the practice of the Council how far the opinion is in effect compulsory.

The dispute between Poland and Czecho-Slovakia in 1923, arising out of the delimitation of the frontier in the Jaworzina region, affords a typical case in which the Court is asked for an opinion as to substance, and as a remarkable similarity characterizes the Council's methods in the handling of such disputes,[2] a detailed examination should prove fruitful.

In its ultimate form the dispute was reduced to the question whether the Decision of the Conference of Ambassadors of July 28, 1920, must be held, in the absence of any agreement between the parties, to be binding, in which case Czecho-Slovakia contested the validity of the

[1] The Council has asked for eight advisory opinions in the course of duties or rights conferred upon it by the 'Minority' Treaties, by the Treaty of Versailles relating to the administration of Danzig, by special requests from the International Labour Office, or requests to the Council by States arising out of activities of the International Labour Office. In such cases the Council merely transmits a request to the Court, and the parties to the dispute are not two sovereign States.

[2] Advisory opinions on the substance of the dispute were asked for in five cases. See above, footnote, p. 164.

Boundary Commission's delimitation proposed on September 26, 1922, which appreciably modified the line laid down by the Decision of the Ambassadors' Conference. Poland held the contrary view, being of opinion that the decision of July 28, 1920, had left undetermined part of the frontier line in the Jaworzina district.

Passions were again aroused in both countries over this question, which in its initial stages in 1919, when the Peace Conference began to deal with it, was characterized by such disturbances that M. Benes was obliged to ask for the intervention of the Council of the League to put an end to the activities of Polish armed bands. Though the situation was now not so critical, the Ambassadors' Conference, representing Great Britain, France, Italy, and Japan, to avoid further trouble decided by the application of Article XI of the Covenant to lay the question before the Council as a matter 'of great urgency'.[1]

The Council, which was then in session, accordingly dealt with the matter without delay.[2]

Its procedure was of the simplest and most brief. In the presence of the representatives of the disputants—Poland and Czecho-Slovakia—who were invited to the Council table in accordance with Article XVII, the Rapporteur, M. Quinones de Leon, followed the obvious course, for it was clear to the Council, both from the letter of the Ambassadors' Conference, and from the brief statements of the two parties, that the dispute turned on a legal question, for the solution of which the advice of the Permanent Court was desired by the parties, as well as suggested by the Ambassadors' Conference.

The Council accepted without discussion the Rapporteur's suggestion of the reference to the Court for an advisory opinion, although the opinion covered the substance so completely. For the Court was to be asked:[3]

'Is the question of the delimitation of the frontier between Poland and Czecho-Slovakia still open, and if so, to what extent:

[1] O. J., Minutes, Nov. 1923, Annex 567. [2] Ibid., p. 1316.
[3] Ibid., p. 1332.

or should it be considered as already settled by a final decision, subject to the customary procedure of marking boundaries locally, with any modification of detail which that procedure may entail?'

Observe now the words with which M. Benes for Czecho-Slovakia and M. Skirmunt for Poland welcomed the reference to the Court.

M. BENES: 'It was necessary that an international authority should take the decision, in order to settle the whole question once and for all. In his opinion the Permanent Court of International Justice was particularly in a position to conclude the matter. Its authority was above all question and every one would accept its decisions.'[1]

M. SKIRMUNT: 'Whether the matter were submitted to the Permanent Court of International Justice, or to another legal body, the solution reached would undoubtedly be recognized by all as valid and final.'

We have thus to note there was no preliminary discussion as to the merits of the dispute by the Council; on the contrary, it preferred to rely exclusively on the Court for the elucidation of the problem, and the views of the Court, though in form advisory, the disputants declared beforehand to be final and decisive.

The sequel is equally impressive. At the next session of the Council in December 1923, the Rapporteur, in dealing with the opinion given by the Court, thus stated the principles upon which the Council should act:

A distinction must be drawn between *what is definitely placed beyond discussion* and what has to be considered by the Council.[2]

Thus the substance dealt with by the opinion was regarded as being definitely placed beyond discussion. 'The Court declares', continues the Rapporteur, 'that the Conference of Ambassadors' decision of July 28, 1920, provides a complete solution of the question of the delimitation of the frontier between Poland and Czecho-Slovakia, and that this decision is final. That is definitely agreed and the point is no longer disputed by either of the Governments concerned.'

[1] O. J., Minutes, Nov. 1923, p. 1316. [2] Ibid., Annex 593.

Again, there was scarcely any discussion by the Council, which simply relied on the Rapporteur to draw up a recommendation on the basis of the opinion. His draft resolution declared the adoption by the Council of the opinion, and proposed the settlement of the subsidiary question in the light of this opinion, namely, whether the Boundary Commission's proposals conformed with the Ambassadors' decision, 'the latter being interpreted in the light of the opinion given by the Court and the accompanying considerations of the Court'. M. Quinones de Leon's draft resolution suggested that the Council's reply to this question should be in the negative.

Again, the conclusions and proposals of the Rapporteur, based on the Court's opinion, were apparently so authoritative that the Council accepted them without question and with very little discussion. M. Skirmunt, for Poland, recalled the fact that 'Poland had bowed to the decision of the Court, and had asked for it to be applied in its entirety'. M. Benes was equally emphatic, and the recommendation was adopted by a unanimous vote.

One may note that the decision of the Council contained a proviso that requirements laid down in accordance with the opinion were 'without prejudice to any changes or arrangements which may be freely agreed to by the Governments concerned'. But this provision has no bearing on the question of the effect of the advisory opinion: it is a right that might quite well be applied to a dispute directly contested before the Court.

The new proposals of the Boundary Commission were accepted by the Council in its session of March 17, 1924, the details of which have no special interest beyond the fact that they were governed by the Court's advisory opinion, and the decision of the Council was accepted by both Poland and Czecho-Slovakia.

Briefly reviewing the case, we may observe that the Council immediately recognized the legal nature of the dispute, and without discussing the merits of the case immediately decided to ask for an advisory opinion on the

substance. The parties agree and regard the forthcoming opinion as providing a decisive and final settlement. The Court gives its opinion, which the Council adopts with little discussion.

'It is surely not too much to say that the Council in effect delegated the task of settlement to the Court; short of a directly contested case at the Court or other arbitral body, no settlement could have been conducted on lines that were more strictly judicial, whilst the finality with which the advisory opinion was regarded by the disputants and acted upon by the Council, gives the opinion almost the character of an arbitral award.

'An examination of the methods of the Council in dealing with the dispute between Albania and Yugoslavia in 1924, respecting the common frontier at the Monastery of St. Naoum, would lead to precisely similar conclusions. Here again the issue, which was referred to the Council by the Ambassadors' Conference, turned on a legal question, namely, whether the decision of the Ambassadors' Conference, dated December 6, 1922, respecting the frontier at the Monastery of St. Naoum was final—a decision which allocated the Monastery to Albania. As before, the Council, without discussing the merits of the question, at once acted on the report of the Rapporteur and decided to refer the question to the Permanent Court in almost precisely the same terms as it had been presented to it by the Ambassadors' Conference, and both parties accepted the recommendation of the Council (June 17, 1924) to request an advisory opinion.

The advisory opinion of the Court gave an affirmative answer to the effect that the Ambassadors' decision was final. The Council acted promptly. The Rapporteur simply embodied the opinion in the recommendation which he proposed to the Council. The Yugoslav representative tried to reopen the whole question, but at the conclusion of his speech, the British representative, Lord Parmoor, very significantly declared: 'He did not think any other answer could possibly be sent to the Ambas-

sadors' Conference except the communication of the opinion of the Court which had been given to the Council on this question.' The Rapporteur, M. Quinones de Leon, strongly agreed with this view, and without further ado the Council adopted the resolution unanimously. And again, such was the authority with which the advisory opinion was invested, that even the Yugoslav delegate, despite his objections, felt obliged to agree to the recommendations, though the Council in deference to his views decided to send the Minutes containing his speech to the Ambassadors' Conference.

It would be wearisome to continue the examples of the conduct of the Council which in each of these cases[1] leads one to the same conclusions respecting the authority and finality of an advisory opinion *vis-à-vis* the parties and the Council. One may, however, finally quote the statements made in a Greco-Turkish[2] dispute when an advisory opinion on the substance was requested. The Rapporteur, Viscount Ishii, remarked upon the 'high value and authority which the Council always gave to the opinion of the Permanent Court of International Justice'.

Section 2. THE RELATIVELY BINDING CHARACTER OF AN ADVISORY OPINION

In thus observing the practice of the Council, both in requesting and accepting an advisory opinion as to substance, we are obviously in the presence of something very different from that of a political body asking for legal advice from lawyers arbitrarily selected. The contrast between the two processes is indeed very great. In a later chapter will be discussed the dispute between Hungary and Rumania over the property of the Optants; that long and intricate question supplies an example of a Committee of the Council, led by Sir Austen Chamberlain, relying on the legal opinion of an *ad hoc* panel of jurists for a report dealing with the substance of the dispute. It is not stated

[1] See p. 164.

[2] Greece and Turkey, 1924 (Exchange of Nationals).

who these jurists were, we are not told the precise questions put to them, nor were the grounds given on which their conclusions were based.

A legal opinion given under such circumstances was not regarded by the Council as anything more than an opinion in the strict sense. Count Apponyi, for example, stated that he could easily name a number of eminent jurists who would give the contrary view. Moreover, the Council did not, in its recommendation, accept the opinion nor the report presented by Sir Austen Chamberlain. At least four members of the Council, including Herr Streseman, the representative of Germany, and M. Loudon, the representative of Holland, declared that the Report did not, in their view, state the legal position correctly.[1]

Such conduct emphasizes all the more the solemn attitude of the Council towards the advisory opinions of the Court which has just been described—a contrast which is heightened by the fact that in the above-mentioned Optant's dispute, Rumania steadily refused the reference of the legal question to the Court,[2] nor did the Council see fit to refer the question on its own account, and this is specially significant as the question to be referred related to the substance. Such in practice was felt to be the binding character of an advisory opinion that a request was not considered possible without the consent of both parties.

The authority with which advisory opinions are invested may again be appreciated in the attitude of the Council towards general interpretations of the Covenant. The Council has on two occasions acted on the assumption that it alone is competent to express judgement on questions affecting the *general* application of the Covenant. It will be recalled that in the Corfu case the Council deliberately refrained from requesting the Court for opinions on the general questions that then arose,[3] (although several Members were in favour of that course), and preferred to seek the help of an *ad hoc* panel of jurists,

[1] See p. 195. [2] See p. 186. [3] See p. 82.

whose opinions would have no special value until they were adopted by the Council. In resorting to such a plan, the Council would be making clear to the world that it was itself formulating the required interpretation of the Covenant, whereas in seeking the opinion of the Permanent Court, an autonomous body with an existence and constitution of its own, the Council, in requesting an advisory opinion, would in substance if not in form be surrendering its competence to decide constitutional questions.

If we approach the question from the angle of the practice of the Court, the relatively binding character of an advisory opinion seems equally impressive. In the Eastern Carelia question over which Finland and Soviet Russia disputed in 1923, we have an example of a legal question covering the substance of the dispute referred by the Council to the Court against the consent of one of the disputants, namely Russia. Confronted by that refusal, the Permanent Court solemnly refuses to give an opinion. The Court emphasized the fact that the opinion which it had been requested to give bore on the actual dispute between Finland and Russia, and after giving its reasons for refusal, the Court proceeded:[1]

> The Court is aware that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point in controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. *Answering the question would be equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot even in giving its advisory opinions, depart from their essential rule guiding their activity as a Court.*[2]

The Court thus shows that when it is a question of giving an advisory opinion, it is not merely fulfilling the function of a legal adviser to the Council. The Rapporteur

[1] See Fachiri, *Permanent Court of International Justice*, pp. 160–4.

[2] Writer's italics.

in the Carelia case, M. Scialoja, had made the mistake of conceiving the Court's function in this narrow sense. In the Report recommending the Council to request an opinion—a Report which the Council accepted without any discussion whatsoever—M. Scialoja declared when referring to the fact that Russia was not a member of the League of Nations, 'Does this situation raise special difficulties as regards the procedure which the Council is invited to follow? We must repeat that the Council is not asked to consider the question of Eastern Carelia as a dispute in which Finland and Soviet Russia are 'parties' in the legal sense of the word. In this procedure there will be no parties in the strict sense of the word, and the Court may give a reply to the question raised by the Council without the countries concerned appearing officially as parties to the case. The whole proceedings may even be carried out in writing.' The Court, as we have seen, did not take this view of the situation and in the words of Mr. Fachiri, the case shows clearly that the Court when exercising its advisory jurisdiction is 'acting in a strictly judicial capacity and, therefore, will be wary of deciding a disputed question of fact upon *ex parte* evidence'.[1]

The most striking instance of the Court acting in a strictly judicial capacity in its advisory proceedings is afforded by the dispute between France and Great Britain over the Tunis nationality decrees. Mr. Fachiri declares that the procedure followed broadly the lines laid down by the Statute and rules of court for contested cases. 'The constitution of the Court proved sufficiently flexible to enable it, whilst preserving the form of advisory procedure, to hear the case substantially as a contested suit.'

The views respecting the virtually binding character of an advisory opinion are still further strengthened by the events of September 1927, when a Committee of three jurists were appointed by the Hague Court to interpret the validity of its advisory opinions. As M. Titulesco pointed out at a Council meeting, the question was

[1] Fachiri, *Permanent Court of International Justice*, p. 162.

whether a national judge should be present when advisory opinions were given.

Previous to September 1927 the Court answered that question in the negative, on the ground that an opinion was not a decision. It then, however, came to the conclusion that an opinion, when there was a dispute in law between the parties, had the same value as a decision and that it was necessary to apply the same procedure. The Report of the Committee stated:

> The Statute makes no mention of advisory opinions, but leaves it to the Court to settle its procedure in regard to them. The Court in the exercise of its powers has deliberately and intentionally assimilated its advisory procedure to its contentious procedure, and the results obtained have abundantly justified this attitude. The prestige enjoyed at present by the Court as a judicial tribunal is to a large extent due to the importance of its advisory activities and to the judicial way in which these activities have been regulated. In practice, when parties come before the Court, there is only a purely nominal difference between contentious and advisory matters. The principal difference consists in the way in which the matter is brought before the Court, and even this difference may virtually disappear as was the case in the question of the naturalization decrees in Tunis and Morocco. It thus appears that the view according to which advisory opinions have not compulsory force is rather theoretical than real.

Whether we view the advisory opinion from the angle of the Council, or that of the Court, we thus can appreciate its unique position and its attributes which in practice endow it with compulsory force.

The importance of this conclusion is evident where an advisory opinion bears on the substance of the dispute. As Dr. McNair states: 'An advisory opinion . . . by passing upon the merits of the dispute is equivalent to an award or decision.'[1] In other words, a dispute which in form is submitted to the conciliatory procedure of the Council is in substance settled by judicial means; and into this class fall the five disputes[2] for which an advisory opinion as to substance has been requested by the Council.

[1] *British Year Book of International Law*, 1926, p. 11. [2] See p. 164.

Section 3. ADVISORY OPINIONS ON THE 'SUBSTANCE' OF A DISPUTE—THE QUESTION OF A UNANIMOUS VOTE

When, therefore, the Council of the League has to request an advisory opinion, the answer to which request, in the words of the Court, 'would be equivalent to deciding the dispute between the parties', the conditions under which that request is made constitute something more than a problem of form. The question whether the Council can request such an opinion, by a majority or unanimous vote, including the vote of the disputants, goes to the very root of its constitution under the Covenant. The significance in practice of an advisory opinion, as we have just been at pains to describe—its formulation by a permanent Court and its inevitable acceptance by the Council—raises a difficulty of a fundamental kind in the path of those who argue that any opinion even as to substance can be requested by a majority vote. If opinions as to substance can be decided by a majority vote, that is to say, against the wishes of one of the parties, we are asked, in the words of Dr. McNair, to believe that the 'true interpretation of the Covenant to be that obligatory jurisdiction has crept in under cover of the Council's power to request an advisory opinion'. No member of the League can be compelled under the Covenant to submit a dispute to arbitration or judicial settlement. The only obligatory method of pacific settlement incumbent on all members of the League is that of inquiry by the Council, that is to say settlement by conciliation, in accordance with Article XV, paragraph 1 of the Covenant. Moreover, in reviewing the position respecting advisory opinions dealing with the substance of the dispute we have shown that it is not enough to look at the practice of the Council —the attitude of the Court must also be taken into consideration.[1]

'We saw that in the three cases cited,[2] unanimity,

[1] See also Phillipse, *Les Fonctions consultatives de la Cour Permanente de Justice Internationale* (Payot, Genève), 1928.

[2] See p. 165.

including the approval of the parties, was obtained by the Council when requesting an opinion. But in respect of the Eastern Carelia question, although the Council adopted the recommendation for an advisory opinion by a unanimous vote, inclusive only of one of the disputants, namely Poland, as Russia refused to send a representative, the Court refused to act. Without expressly stating that the Council had acted improperly, the Court showed that the rights of Russia were being infringed.

> States not Members of the League . . . are not bound by the Covenant. The submission therefore of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could only take place by virtue of their consent. Such consent, however, has never been given by Russia. On the contrary, Russia, has, on several occasions clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion. The Court therefore finds it impossible to give its opinion on a dispute of this kind.

We have already given a possible reason, explaining why the Council thought it could act in this way without the consent of Russia. The Rapporteur's report took too narrow a view of the significance of the advisory opinion and of the function of the Court.[1]

In any estimate of the need for a unanimous vote by the Council when it has to request a substantive opinion from the Court, it is therefore not sufficient to consider the powers of the Council under the Covenant; the Eastern Carelia Opinion shows that the attitude of the Court is also a vital factor. If the Council may consider that it can ask for an opinion by a majority vote, that is to say, one of the parties opposing, the Court may think otherwise and refuse to act unless the vote is approved by the disputants. This consideration is not always sufficiently appreciated by commentators.

[1] See p. 173.

The Council was in later years to show that the opinion of the Court in the E. Carelia case could not be ignored. When, in March 1928, the Council had to consider making a request for an advisory opinion as to substance in response to an appeal from a Greco-Turk mixed Commission, it was not clear that both parties, Greece and Turkey, approved the step, and a Committee of Jurists appointed by the Council reported that 'the Council should respect the precedent established by the advisory opinion of the Permanent Court of International Justice, dated July 23, 1923, on the question of Eastern Carelia, Finland, and Russia. Having regard to this precedent, the Council would probably not be prepared to ask the Court's opinion without Turkey's concurrence'. In view of this circumstance, the Committee was unanimous in asking whether it might not be desirable for the President of the Council first of all to ask the two Governments concerned whether they were prepared to consent to the Council submitting to the Court the question raised by the Mixed Commission.

In a dispute between Members of the League, the Council has not dared to request a substantive opinion in the face of the opposition of one of the parties. Its caution is very strikingly shown, again and again, in the dispute between Hungary and Rumania (the question of the property of the optants). The entire course of the long-drawn-out proceedings from 1923–8[1] was in essence a struggle between Count Apponyi, the representative of Hungary, who tried to obtain a judicial settlement by means of an advisory opinion, and the Rumanian delegate who as stubbornly refused on the plea of vital interests, a refusal which the Council could not ignore, such was the respect of the Council for the rights of a member of the League 'not to litigate except by its own free choice'.

In all requests for substantive opinions we can safely conclude that the Council will hesitate to proceed other than by a unanimous vote inclusive of the votes of the disputants.

[1] See Chapter IV, p. 185.

Section 4. ADVISORY OPINIONS ON QUESTIONS OF COMPETENCE OR PROCEDURE

The Council has requested opinions which are not substantive, that is to say, are not 'equivalent to deciding a dispute between the parties', to use the language of the Court. They may be said to refer to the conduct or procedure of the Council in settling disputes. Manifestly the need for the Court's advice on questions of method must have a very limited scope. It is the obvious task of the Council itself to choose the most suitable methods of settling any particular dispute—a task surely not beyond the intelligence of its Members—and in fact in no case of a dispute referred to the Council in pursuance of Article XI has an advisory opinion on any question of method strictly speaking been requested. It is true that in the Mosul case, which the Council dealt with in accordance with the Treaty of Lausanne, an opinion other than substantive was asked for, but even so, it was to decide a very special question, namely whether the Council under the Treaty of Lausanne was authorized to make a binding award; advice on the Council's procedure under the Covenant was not asked for.

In two other cases,[1] advisory opinions were requested on the question of the competence of the Council[2] in virtue of Article XV, paragraph 8, the clause which reserves matters not regulated by international law[3] to the exclusive jurisdiction of a State. Questions of competence may indeed be regarded as 'wider questions of procedure', as M. Scialoja once remarked.[4] And such questions, particularly if they depend on the interpretation of Article XV, paragraph 8, of the Covenant—often presenting a very complex legal problem—offer a suitable field for requests to the Court. It is not so clear that questions of com-

[1] Tunis Nationality Decree (France and Great Britain); Expulsion of the Oecumenical Patriarch (Greece and Turkey).

[2] See Chapter V, p. 211, Competence of the Council.

[3] Ibid., p. 214.

[4] During the discussions of the Salamis case, see p. 223.

petence depending on other restrictive principles such as rules formulated by the Council itself, need to be elucidated by the Court: the Council can readily settle such questions itself with the help of its own jurists, for they do not give rise, as a rule, to legal problems of outstanding difficulty.[1]

The Council, moreover, is rather jealous of its right to be sole judge of its competence, as the discussion in the *Salamis* case showed,[2] and to ask for the Court's advice on a question of competence would not always be a dignified course:[3] the authority of an advisory opinion is such that the Council might feel in some cases that the Court would be virtually usurping that right in declaring that the Council was competent or not competent.

The three examples of opinions other than substantive, and one of which was given in a case not dealt with in pursuance of the Covenant but under special powers conferred by a special Treaty, do not provide much material for establishing principles based upon precedent, and can scarcely solve the vexed question whether an opinion on procedure can be requested by a majority or by a unanimous vote.

In the Franco-British dispute (Tunis Nationality Decree) the request for an advisory opinion was made on the suggestion of the parties themselves, and the Council formally adopted the plan without discussion by a unanimous vote, the parties, Great Britain and France, occupying their places as regular members of the Council.

In the other case, Greece and Turkey (expulsion of the Oecumenical Patriarch), the request for an advisory opinion as to competence was adopted by the Council with the approval of Greece. M. Caclamanos accepted the resolution and the Official Report adds, 'The resolution was adopted'. Turkey was not represented, but the

[1] See pp. 222, 225 (dispute between Greece and Turkey—Maritza, and dispute between Albania and Greece—minorities).

[2] See p. 223.

[3] Compare Herr Stresemann's comments in Salamis case, p. 223.

Turkish Government had communicated a long letter[1] to the Secretary-General giving at length its reasons for challenging the competence of the Council: these were two, (1) the plea of domestic jurisdiction, (2) the exclusive jurisdiction of the Mixed Arbitral Commission to settle questions of exchange of populations. The vote was taken in the absence of Turkey: but it should be noted that there was no dissentient vote at the Council table; no one voted against; and Turkey's attitude was benevolent to the League—her absence was due to the notion—a mistaken notion—that the plea of domestic jurisdiction would be destroyed *ipso facto* by the reference of the question to the Council.

In these circumstances the Council felt able to make its request for an advisory opinion in Turkey's absence, and the question was formally placed on the agenda of the Court's proceedings; but light on the question from the point of view of the Court cannot be given, as the parties acted on the suggestion of the Rapporteur to settle their differences by negotiation, and the request for an opinion was expunged from the Court's proceedings.

Again, during the dispute between Great Britain and Turkey (Mosul), when the Council proposed to request an opinion on a point of procedure, one of the parties, Turkey, definitely opposed the motion. The Council then resorted to the expedient of not counting the votes of the disputants in reckoning unanimity, whilst the Court on its part gave the opinion requested by the Council, indicating that the Council's recommendation in the case had binding force.[2] But, as stated, the Council was not acting in pursuance of Article XI.

This power to act without the consent of the disputants in regard to requests for advisory opinions relating to procedure or competence seems reasonable enough. Article V, paragraph 4, of the Covenant provides for majority decisions in all questions of procedure, and the

[1] See p. 213. [2] See p. 163.

Council would be placed in an absurd position if its judgement as to its competence were dependent upon the approval of both parties. When the question of competence is raised, it is usually one of the parties which challenges the jurisdiction of the Council, and as we shall show in Chapter VI, where the general question of the competence of the Council is discussed, the Council has on one occasion expressly barred the parties from voting. It would, therefore, seem illogical to maintain that, when the Council desires to ask the Court for an opinion on a similar question, the approval of both parties is necessary.

It must, however, be stated that the Mosul example and the Greco-Turkish case have not established in the minds of the Members of the Council the principle that advisory opinions relating only to questions of procedure or competence can be requested by a majority vote.

During the discussion of the *Salamis* case,[1] the Rapporteur proposed that the Council should ask for an opinion on the question of its competence, *vis-à-vis* the powers of the Greco-German Mixed Arbitral Tribunal to deal with the matter at issue. Although the question in no way infringed on the substance, great differences of opinion were evident. Some Members, M. Guani, the President, and M. Titulesco, held that the request should be unanimous; the latter stated that, if in his view unanimity was necessary in order to submit a question for an advisory opinion in a matter which did not concern an Article of the Covenant (namely, the *Salamis* case under discussion), it was all the more necessary to have unanimity if the question was put before the Council in virtue of the Articles of the Covenant.

M. Scialoja, on the other hand, held the contrary view. 'I think', he said, 'that according to the terms of our rules of Procedure and of the Covenant, a simple majority is enough, because it is a question of procedure. The opinion which we ask is one act of this procedure, and we

[1] See p. 223.

are always free not to accept that opinion. Further, the matter is one of an act of procedure in regard to a question of procedure, for questions of competence belong to the category of the larger question of procedure. Without insisting on this point, I think that the votes in the request for an advisory opinion, especially in the present case, should be taken by a majority and not unanimously.'[1]

In the end the Council decided not to ask for the Court's opinion, but to rely on the report of a Committee of Jurists.[2] This example is given, not because any special weight is attached to the words just quoted, but in order to show that the Council in its practice avoids the necessity of having to lay a general rule on the question.[3]

There are occasions when questions of procedure may shade into substance: this was notably the case when, in the course of the Hungarian dispute,[4] the Hungarian representative proposed that the Court should be asked for an opinion as to whether the Council was bound in virtue of the Treaty of Trianon (Article 239)[5] to appoint substitute arbitrators to the Mixed Tribunal in place of the one withdrawn by Rumania, and so compel the arbitration to proceed. The case is described in detail in Chapter IV, and it will be clear that this step proposed by Hungary, although a matter of procedure, ran counter to Rumania's objections of substance, and the episode illustrates the difficulty of laying down distinctions in the abstract between procedure and substance, and the consequent difficulty of establishing a general rule.

The adhesion of the United States to the Permanent Court will probably make the practice of a decision by a majority vote even more difficult to establish. The proposal of the Jurists[6] provides that the United States

[1] See p. 224. [2] See p. 224.

[3] Discussions at the 1st Commission of the Assembly, 1928, reveal great divergence of opinion on the question, but a most convincing case for unanimity was made by Sir Cecil Hurst, for Great Britain.

[4] See p. 185. [5] See p. 190.

[6] Report of Committee of Jurists on adhesion of U.S.A. to the Permanent Court, *The Times*, Mar. 19, 1929.

Government should be informed, and be given all the relevant facts, when an opinion is asked for by the Council, and the views of the United States Government will have the same force as a vote of a Member of the Council in regard to the Request. This seems to attach increasing weight to the individual votes, and consequently to a dissentient vote.

IV

DIRECT METHODS

THE Council does not always seek the help of outside bodies such as Commissions of Inquiry or the Permanent Court (the quasi-arbitral methods which were discussed in the last two chapters), but sometimes depends solely on its own efforts—its discussions at the Council table, the reports of its Rapporteur, or of a Committee of its members. On such occasions the parties to the dispute may play a positive part at every stage of the proceedings, and the activities of the Council may be regarded as a form of diplomacy by conference, of which the essential characteristic would lie in a settlement based upon mutual concessions and these may be made regardless of existing treaty rights.

Where treaties and ascertained facts do not impose a settlement, but a balance of interests is to form the basis of agreement, the equity of the settlement is entirely dependent on the moral sense of the members of the Council, on their ability to preserve a disinterested attitude. The direct method is thus exposed to possible abuse and leaves a greater margin for the play of arbitrary influences than the two methods described in the previous chapters, where the Council bases its proposal on an opinion of the Court or a Report of a neutral Commission.

It is therefore noteworthy that the Council has reserved for its own efforts very few cases, and these were, with one notable exception, particularly suited to the direct method; it has preferred to settle most other disputes by methods which leave little scope for the play of interested or partial influences extraneous to the objective merits of a dispute,[1] for most of the dis-

[1] See Chapter VII, p. 246, where the choice of the Council's methods is reviewed.

putes for which the Council recommended settlements were either concerned with questions of fact (Commissions of Inquiry), or questions of existing rights (Advisory Opinions); very rarely a dispute occurred which did not turn on either of these questions, and which needed a settlement apart, it might be, from treaty rights. In such a case the Council, representing the Powers in Conference, would naturally be the most obvious tribunal for the task. The conduct of the Council in the two notable cases which it attempted to settle by its own efforts, namely the Hungarian Optant dispute and the partition of Upper Silesia, shows the great possibilities and limitations of the direct method.

Section I. THE COUNCIL'S DIRECT METHODS, ILLUSTRATED BY THE HUNGARIAN OPTANT DISPUTE

The dispute between Rumania and Hungary relating to the property of the Hungarian optants gives a very complete illustration of the Council's direct methods.

The Council is revealed as a deliberative body of a high order. No other case offers an example of debate conducted with such skill and learning. The marvellously persuasive and closely reasoned contributions of Count Apponyi, the octogenarian protagonist of Hungary, were matched by the passionate eloquence of M. Titulesco, the protagonist of Rumania. The other members of the Council were not content merely to listen, but themselves played a notable part in the discussions, the three Foreign Ministers, M. Briand for France, Herr Stresemann for Germany (in the later years of the controversy), Sir Austen Chamberlain for Great Britain, contributed substantially to the arguments. Discussion at the Council table was the chief means relied upon, and, as we shall proceed to show, was the most appropriate method in view of the nature of the case.

Even a Committee of the Council under the chairmanship of Sir A. Chamberlain, the Rapporteur in the later

stages, were unable to settle the matter away from the Council table. Their recommendations did not survive a searching scrutiny by the Council, which continued to the end to concern itself directly with the question. This general deliberation, maintained besides at so high a level, is unique in the history of cases dealt with by the Council. Constitutional issues far exceeding in importance the original issues of the dispute arose in the course of the discussions and justify a rather detailed examination.

Justiciable or Non-justiciable?

The dispute opened in April 1923, when Hungary requested the Council in accordance with Article XI, paragraph 2, to declare that the agrarian laws of Rumania applied to the Hungarian landowners who had opted for Hungarian citizenship were contrary to the Treaty of Trianon.[1]

Briefly the issue could thus be stated: Were the Rumanian land laws in conflict with the Treaty of Trianon? (See footnote.) The Council was faced by a question the answer to which depended upon the interpretation given to the Treaty of Trianon. Surely a classic case suitable for judicial settlement by the Permanent Court?

A priori, nothing could be less doubtful: Article XIII of the Covenant expressly mentions that 'disputes as to the interpretation of a treaty' are declared to be 'among

[1] Under Article 63 of the Treaty of Trianon, the inhabitants of territories acquired by Rumania were given the right to become citizens of Hungary (to 'opt' for Hungary, hence the name 'optants') and to retain their title to their immovable property in the new parts of Rumania. The Rumanian Government proceeded to expropriate this landed property in pursuance of agrarian laws, which were being applied to all owners of estates, whether Hungarian or Rumanian, and the compensation paid was according to western standards a ludicrously small percentage of the market value of the land. Hungary held that these laws applied to the optants contravened Article 63 of the Treaty of Trianon, and asked the Council to order 'that the immovable property of persons opting in favour of Hungary, confiscated as a measure of agrarian reform, should be restored to them'. O. J., June 1923, p. 575.

those which are generally suitable for submission to arbitration or judicial settlement', and 'for the consideration of all such disputes the Court to which the case shall be referred shall be the Permanent Court of International Justice . . . or any tribunal agreed on by the parties to the dispute'. International lawyers have pointed out the difficulty of defining justiciable as opposed to non-justiciable disputes, but even so, they asserted that there were certain obvious characteristics which served as guide-posts in a doubtful area, and one of those characteristics was precisely a question of treaty interpretation.

The difficulty, however, of relying on general definitions for guidance, even when the more obvious characteristics are present, is clearly shown in the example before us. The Council recognized that the case *prima facie* called for a judicial solution and recommended that the dispute be referred to the Permanent Court for settlement.[1] But M. Titulesco's objections showed that political considerations overshadowed the legal aspect. The following quotation gives an argument on which he depended again and again throughout the controversy:

'Is this the kind of question which you wish to see submitted to arbitration? To accept this solution would be to submit to arbitration, not merely a problem but a veritable page of history . . . We are dealing with a State which represents millions of peasants, which is a collective body composed of millions of small individual proprietors and taxpayers. You propose that an arbitrator should be allowed to decide that what the peasant possesses to-day he does not possess definitely . . . If we have violated international law, it is by our own Constitution, by the supreme law which to-day governs relations between Rumanians.'

Here was stated with some force a fundamental objection to compulsory arbitration, as opposed to conciliation —a case had arisen in which the economic destiny of an entire nation might lie at the mercy of a decision of a

[1] This is the only example of an attempt at direct reference of a dispute from the Council to the Court (i.e. not for the purpose of obtaining an Advisory Opinion but for direct settlement by the Court).

tribunal of neutrals, without the people concerned having a voice in the settlement of their fate.

This was not the only political element which transformed the legal nature of the dispute. Another issue, more clearly evident in the later stages of the case, might be stated thus: In accordance with what principles of international law was the Treaty of Trianon to be interpreted?

The Hungarians would reply: In accordance with the great majority of scientific authorities on international law from Vattel to Calvo and Lammasch, all of whom maintain that common international law affirms the inviolability of the property of foreigners in whatever territory, unless subject to a special dispensation. They would quote in support recent decisions of the Permanent Court which they held to confirm that principle. But in so contending the Hungarians were by no means on safe ground. In a very illuminating article on 'The Property of Aliens', Sir John Fischer Williams shows that 'where no treaty or other contractual or quasi-contractual obligation exists by which a State is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or "adequate" compensation'.[1]

The Rumanians in their turn would reply that the Treaty should be interpreted with special regard to the request made by the Hungarians before its conclusion, namely, to the effect that Hungarian landowners should be treated on the same terms as Rumanian landowners.

If the kernel of the dispute is thus a question of deter-

[1] *British Year Book of International Law*, 1928. Not content with showing the absence of international authority for the doctrine, Sir John Fischer Williams proceeds to show with great force that it is undesirable that the rights of Hungarian property-holders should be left to 'depend on a disputed general doctrine, which, even if accepted in word, can be avoided in fact, and which in its unqualified form would bring international law into the economic conflict (i.e. collectivists versus individualists) and set it in opposition to at least two of the most powerful currents of human feeling'.

mining the principles of law in the light of which the Treaty of Trianon should be interpreted, we are no longer faced by a legal question. To determine the principles of law according to which an arbitration is to proceed is a task that properly belongs to the political sphere.

Hungary sees every advantage in sticking to the letter of the law, interpreted in the light of what her representatives believe to be the general practice, and wants no change, and therefore asks for a judicial settlement.

Rumania stubbornly opposes the reference to the Court because of her fear of an adverse verdict—a fear which Count Apponyi accentuated by maintaining that international law lays down that in general the property of foreigners is inviolable. The entire Rumanian nation believed such a principle would be unjust as applied to their case, and before consenting to judicial settlement, desired in effect that the principles should be freshly stated in accordance with which the Treaty of Trianon could be interpreted. Without this safeguard Rumania felt that she could not possibly risk the possibility of an adverse arbitral award which might be based on a law which she considered unjust.

One cannot fail to observe how the question of the method of conducting the case is thus involved in the question of substance. In such circumstances the Council could do no other than respect Rumania's refusal to allow the dispute to be settled directly by the Court. Its attempt to request an advisory opinion proved equally vain, although when the Rapporteur, M. Adatci, proposed this step he rather surprisingly said it was understood 'that the Council's freedom of decision would be in no way limited'.[1]

The Hungarian representative readily accepted this proposal and, anticipating Rumania's refusal, expressed the view that a majority decision would suffice for the purpose in accordance with Article V, paragraph 2, of the Covenant.[2] The Council did not, however, act on the

[1] See p. 170, Section 2.

[2] See Chapter III, Advisory Opinions, Section 3, p. 175.

assumption that an advisory opinion bearing on the substance of the dispute was a matter of procedure, and M. Adatci's proposal fell to the ground. The Council authorized him later to mediate between the parties at Brussels,[1] but although the negotiations achieved some sort of an agreement, this was subsequently disavowed,[2] and Count Apponyi made a renewed and vain demand for an advisory opinion; but the Council contented itself with exhorting the parties to exercise goodwill.

Compulsory Award versus *Amicable Agreement*

During the intervening years Hungary made a very skilful attempt to obtain an arbitral award on the question by other means, relying this time not on the Covenant but on Articles 250 and 239[3] of the Treaty of Trianon, which conferred on the Mixed Arbitral Tribunal compulsory jurisdiction in regard to claims relating to

[1] May 26, 1923. [2] Council Meeting, July 25, 1923.

[3] *Article 250. Treaty of Trianon*: 'The property, rights, and interests of Hungarian nationals . . . situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation. Such property, rights, or interests shall be restored to their owners, freed from any measure of this kind, or from any other measure of transfer . . . taken since November 3rd, 1918, until the coming into force of the recent Treaty. . . . Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239.'

Article 239: 'A Mixed Tribunal shall be established between the Allied and Associated Powers on the one hand, and Hungary on the other hand. Each such Tribunal shall consist of three Members. Each of the Governments concerned shall appoint one of three members. The President shall be chosen by agreement between the two Governments concerned.

'In case of failure to reach agreement, the President and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations. These persons shall be nationals of powers that remained neutral during the War.

'If in case there is a vacancy a Government does not proceed within a period of one month to appoint, as provided above, a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President.

'The Tribunal shall decide by majority.'

liquidation of ex-enemy properties. Now Article 250 exempted the property of Hungarians situate in the new parts of Rumania from measures of liquidation or retention to which ex-enemy nationals in Allied countries were generally subject. What if the expropriation from which the optants suffered under the Agrarian laws amounted in fact to liquidation? In that case Article 250 would apply. Here was a judicial Tribunal, contended the Hungarians, authorized by Treaty to deal compulsorily with such cases. To it, therefore, the optants brought their claims for restitution. Hungary was playing her trump card, although played rather late in the game.

Rumania was placed in a very difficult position. Her point of view may thus be summarized. She had refused the appeal of the Council of the League to refer the question to the Court at the Hague on the ground that the economic fate of her people could not be decided by a third party, however august. Were her laws now to be subject, by an unexpected reading of the Treaty of Trianon, to the will of a worthy neutral gentleman presiding over a Mixed Arbitral Tribunal? By no means. Rumania contested the competence of the Tribunal to deal with cases affected by agrarian reform.

'Ought we', M. Titulesco declared, 'to have attended as persons amenable to the Court? That would have been impossible, for to have done so would have been to recognize the right of the Tribunal, nay, the right of one man, namely the President of the Tribunal—for national judges have a natural tendency to adopt as their own a national point of view despite their impartiality—to order the Rumanian Government to restore the land given to peasants or to increase the financial burdens resulting from the agrarian reform. It would have been to recognize the right of one man to order the social, political, and financial overthrow of a country. We could not agree to that.'

The Tribunal not only declared itself competent, but, according to M. Titulesco, declared that it was competent to try such cases in accordance with the principles which established the inviolability of property belonging

to foreigners. This was to lay aside or at least jeopardize the principle of equality of treatment which Rumania held to be specially applicable to the Optants in accordance with Hungary's declaration at the Peace Conference; but of even greater importance was the Rumanian objection to submit claims arising out of her Agrarian Reform Laws to arbitration. Rumania believed that in such circumstances the Tribunal had exceeded its powers, and she therefore withdrew the Rumanian arbitrator from the bench.

Having taken this drastic step, Rumania did not leave matters there, but decided to justify her action before the Council of the League, and accordingly requested that her action in withdrawing her arbitrator from the Mixed Arbitral Tribunal be considered under Article XI, paragraph 2, of the Covenant.[1]

The Hungarian Government retorted by a very astute move. It requested that the terms of reference of the dispute drawn up by Rumania should be linked with the Hungarian view of the action desired of the Council in the matter, namely, the immediate appointment by the Council, in virtue of Article 239 of the Treaty of Trianon, of two Deputy Arbitrators for the Mixed Rumano-Hungarian Arbitral Tribunal. This was Hungary's ace of trumps. Hungary had attempted to compel Rumania to accept arbitration through the Mixed Arbitral Tribunal in pursuance of Article 250 of the Treaty of Trianon, and now endeavoured to compel the Council to ensure arbitral proceedings by reference to the Council's obligations under the Treaty.[2]

The problem was in its essentials the same, namely, the request by Hungary for a legal decision as to whether the agrarian laws were contrary to the Treaty of Trianon: the refusal of Rumania to submit a matter of vital interest to arbitration, a refusal strengthened by the fear that the Tribunal would decide in the light of principles which Rumania believed to be unjust and inapplicable.

[1] O. J., Minutes, Apr. 1927. [2] Mar. 1927, Minutes, O. J., Apr. 1927.

All the arguments previously used were repeated with even greater force and clarity by the protagonists. But to these were added constitutional arguments relating to the powers and duties of the Council of the League in virtue of the new turn given to the forms of the dispute by the reference to Articles 250 and 239 of the Treaty of Trianon.

Ought the Council to have consented to deal with a dispute which was already being examined by another tribunal? Was not such action in conflict with Article XV, paragraph 1, of the Covenant?[1] An arbitral tribunal established by Treaty had already declared itself competent to deal with the question. Could the Council question that decision, or deal with a matter which was *res iudicata*?

Ought the Executive to interfere with the judiciary? And would not the Council in interfering strike a blow at the system of arbitration and the establishment of law in international life, if it was to act as a Court of Appeal and set itself above the international magistrature? Was not the duty of the Council plain and simple, namely, the ministerial one of at once appointing the deputy judges in accordance with Article 239 of the Treaty of Trianon in place of the Rumanian arbitrator, and allow the arbitration to proceed?

On points such as these Count Apponyi based his arguments with tremendous force and eloquence.

The Council did not so conceive its duties. In the first place it proceeded to consider the dispute under the overriding terms of Article XI, paragraph 2, of the Covenant. It was widely felt that the issues involved affected not only Rumania, but Czecho-Slovakia and other Succession States. If minorities were held to enjoy special privileges under the Treaties of Peace, contrary to stipulations which, according to M. Titulesco,[2] were made to M. Benes at the Peace Conference, a disturbed situation would certainly be created.

The Council, moreover, did not consider that it was

[1] See p. 220.

[2] O. J., Apr. 1927. Council Meeting, Mar. 7, 1927.

interfering with an arbitration, in view of the fact that the latter proceeding had broken down, and one of the parties had withdrawn from it.

In the striking words of M. Briand:

'Whatever Count Apponyi may say, a tribunal, even an arbitral tribunal, is not a supreme absolute Court which lays down for itself indefinite rules regulating its competence. It is the result of an agreement to arbitrate, as is the case with all arbitral tribunals. It cannot lay down the law without rule and without limit. Mixed Arbitral Tribunals are the result of an agreement to arbitrate known as a Treaty. Their first duty is not to overstep the bounds of that Treaty, and if they do so they commit a grave misdemeanour and are guilty of an abuse of power, which the Council of the League of Nations, composed as it is of States which took part in framing that Treaty, and which drew up and established the agreement, has the right—I would even say the duty—of examining. When one of the interested parties brings a question before the Council, that duty is absolute.

'Let us put on one side, therefore, the question whether we are competent to intervene and interpret this agreement to arbitrate.'

Thus the Council conceived it to be its duty to examine, not the course of the arbitration, but the agreement to arbitrate—that is to say, to assist in the formulation of principles in accordance with which the arbitration would be conducted.

In this spirit the Committee of three members of the Council, consisting of Sir A. Chamberlain, who had succeeded M. Adatci as the Rapporteur in the case, assisted by Viscount Ishii (Japan) and M. Villegas (Chile), considered the problem, and made their report to the Council after frequent meetings in London and Geneva with the representatives of the disputants.[1]

The Committee recommended that the arbitration should proceed provided that the disputants were agreed on the principles (see footnote, p. 195) in accordance with which the arbitration was to be conducted: subject to the acceptance of which, the Rumanian arbitrator was to be reinstated, and the Committee added that, in the

[1] During May and June 1927.

view of eminent jurists whom they had consulted, these principles were obligatory on the signatories of the Treaty of Trianon.[1]

This Report gave rise to a lively discussion and furnishes a unique example of the Council going so far as to refuse to accept a Report without drastic alteration from a Committee of its members. From the discussions, it was apparent that nine members of the Council were of opinion that the rules proposed by the Committee of three correctly expressed the obligations arising out of the Treaty of Trianon; but four members, including Herr Streseman, the representative of Germany, and M. Loudon, the representative of Holland, were not of this opinion and were prepared only to regard the Report as a possible basis of friendly agreement which they were free to modify.

The proposal was accordingly modified, the provision aiming at enforcing the parties to adopt the recommendation was deleted,[2] and in its final form the resolution merely provided a starting-point for the resumption of direct negotiations.[3] So Count Apponyi interpreted the

[1] The Report further provided steps to enforce the parties to adopt the recommendations. This provision is discussed in Chapter VII, dealing with the force of the final recommendations of the Council, p. 235.

[2] See Chapter VII, p. 234.

[3] This resolution, both in its original and final form, admitted the competence of the Mixed Arbitral Tribunal to entertain claims arising out of the application of the Rumanian Agrarian Law to Hungarian Optants, if the law led to 'retention or liquidation', but not otherwise, that is, not on claims arising out of the application of the law as such.

The recommendation of the Council, Sept. 19, 1927, in its final form was not properly drafted. It proposed the adoption of the first half of the original resolution, including the three principles which the parties were to 'take into consideration' on the suggestion of M. Scialoja, and not in the language of the original resolution to regard as obligatory. These principles were that (1) the peace settlement did not exclude any Hungarian nationals in Rumania from the application of a general scheme of agrarian reform; (2) there must be no inequality between Rumanians and Hungarians, either in the terms of the Agrarian Law, or the way in which it is enforced; (3) the words 'retention and liquidation' . . . apply solely to the measures taken against the property of a Hungarian . . . in so far as such owner is a Hungarian national (O. J., Oct. 1927, p. 1382.)

resolution in abstaining from voting, and so Herr Stresemann defined his attitude in supporting it.

Thus the Council did not collectively express an opinion as to the principles according to which the Mixed Arbitral Tribunal should function in applying Article 250 of the Treaty of Trianon. The arguments of Count Apponyi may be said to have—if not won this round of the struggle—at least taken all the substance out of the victory which the Report of the Committee of three would have given Rumania.

Some students, among whom the writer includes himself, regret that the Council did not more definitely create a precedent and lay down quite clearly the principles according to which the Mixed Arbitral Tribunal should act, and thus serve as a sort of 'Court of Equity'—to use the words of Sir A. Chamberlain. The hesitation of the minority of the Council arose from ideas which were based on too strict an analogy of the machinery of law in the national sphere. M. Titulesco's comments thereon are extremely to the point:[1]

'The thesis has been developed here that the Council is a political body and that, therefore, it should have nothing to say upon legal questions. That is an application to international life to meet the needs of a particular case of the principle of the separation of powers which exists within States. In order that there may be such a separation of powers, I would ask where are the three powers in international life?

'There is no legislative power because the League is not a super-State; the judiciary power does not exist, as international justice is optional and lives only on compromise and within the boundaries of compromise. We all deplore the absence of executive power. . . . These three powers do not at present exist in international life. . . . To make up for this, however, there is a body—the Council of the League—which by its moral authority sets in motion the legislative power of each State, which by its recommendations acts also as judge in cases where there is no compulsory arbitration, and until now has done its best, by various means, to ensure that its decisions shall be carried out.'

[1] O. J., Minutes, Apr. 1928, p. 427.

Count Apponyi was to gain a further advance in 1928. Direct negotiations having failed on the basis of the Council's resolution of September 1927 (see page 195), Sir Austen Chamberlain, at the meeting of the Council in March 1928, proceeded to give effect in part to Hungary's request for the appointment of neutral arbitrators to the Mixed Arbitral Tribunal. Much uneasiness had been felt by many international lawyers because the Council had not seen fit to carry out Article 239 of the Treaty of Trianon (see p. 190). It had preferred to postpone the appointment of the judges, pending the issue of direct negotiations between the parties. Meanwhile there had been much discussion amongst jurists, including debates by learned judges in the British House of Lords, and opinions by lawyers of the renown of Sir John Simon, according to which the Council's duty to appoint the deputy arbitrators was held to be an unconditional 'ministerial' duty. Professor Brierly vigorously contested this view, and his arguments carry conviction.[1]

[1] 'It is impossible', states Professor Brierly, in his Opinion to the Rumanian Government, 'to read an imperative direction to the Council into the language of Article 239. . . . The draftsmanship of the Article is curious. It contemplates that the Council should choose a President and two substitute members in a certain event, namely, "in case of failure to reach agreement", words which clearly have reference to the possibility that the two parties might fail to agree in the choice of a President. But the event that has happened in the present case is that Rumania has informed the Tribunal that her arbitrator will no longer sit to hear matters arising out of the Rumanian agrarian Reforms. Even if we assume that this Rumanian action has created a "vacancy", all that the Article actually says is that in that event a substitute for the Rumanian member "shall be chosen by the other Government from the two persons mentioned above other than the President", that is to say, from two persons chosen by the Council because of the failure of the parties to reach agreement in the choice of a President, an event which has not occurred. No doubt, *ut res magis valeat quam pereat*, we are entitled to read into the article a power in the Council to nominate the two persons in the event of a vacancy, but when the suggestion is that the Article imposes, in Count Apponyi's words, an "absolute obligation" on the Council, it is relevant that the present difficulty is, actually, on the terms of the Article a *casus omissus*. At the most it may be said that the Article assumes that the Council will appoint

Sir Austen Chamberlain, whether affected by these discussions or not, proposed, at the March meeting (1928), an arrangement which met with the unconditional acceptance of Count Apponyi, namely, that Hungary and Rumania should agree 'that the Council should name two persons, nationals of States which were neutral in the War, who should be added to the Mixed Arbitral Tribunal as established by Article 239 of the Treaty of Trianon (i. e. that Tribunal including the Rumanian member, who would be restored to it by his Government), and that to this arbitral tribunal of five members there should be submitted the claims which have been filed under Article 250 of the Treaty of Trianon by Hungarian nationals who have been expropriated under the agrarian reform scheme in the territory of the Austro-Hungarian Monarchy transferred to Rumania'.

Count Apponyi naturally accepted the proposal, for it amounted to a resumption of arbitration without any special conditions being laid down. In accepting this proposal he no doubt felt the gratification of a victorious and heroic pleader.

It was M. Titulesco's turn to oppose. What of the previous resolutions of the Council? Did they still have value? Were the arbitrators to be bound by the resolution of September 19, 1927, whereby the claims under agrarian law as such were declared to be outside its competence? [1]

The members of the Council did not all agree with this reading of the resolution whose purport we have already discussed, and Herr Streseman pointed out, 'M. Titulesco considers the resolution adopted in September to be the expression by members of the Council of their conviction of the legal position in the case under review. I do not

the two substitutes; but the mere fact that the Tribunal cannot function unless the Council does so, cannot of itself, by implication, create an obligation on the Council to make the appointments, and no such obligation is contained in the words of the Article.'

[1] See p. 195.

think that this is so; it serves as a basis of discussion which the parties could amend and modify.'

At this point the Council deemed it expedient to go into private session and continue the discussion, after which a resolution was proposed which did not meet the Rumanian point of view in regard to the principles of the arbitration. While its previous recommendations had 'value', it was clear that the Council did not desire to tie the hands of the arbitrators in any way. The form of this resolution[1] further confirmed the action of the Council, in September 1927, in rejecting the report of the Committee of three and refusing to express an opinion as to the legal substance of the case, or to encroach upon the competence of the Mixed Arbitral Tribunal. The disputants were asked to give the replies of their Governments at the next session of the Council.

The Council was still mediatory to this extent: that it viewed the appointment of the two neutral arbitrators as a duty conditional upon the approval of both disputants to proceed with the arbitration.

When at the next session (June 1928) the Hungarian Government approved and M. Titulesco refused his consent, the Council unanimously maintained this attitude, and did not act on Count Apponyi's suggestion that the time had come for what he regarded as the strict application of Article 239. The Council was unanimous in now proposing direct negotiations between the parties, Sir Austen Chamberlain declaring that:

> 'The purpose of arbitration is not to arbitrate for the sake of arbitrating, but to settle a dispute, and in every case a direct arrangement between the parties is better than an arbitral award: moreover, there are occasions when real peace can only be brought into the minds of men whose interests and sentiment are in conflict if the decision ultimately taken as the result of mutual concessions is freely accepted and is not imposed by external authority.'

[1] Containing the proposal of Sir A. Chamberlain, mentioned above, to appoint auxiliary judges.

The wisdom of this statement was proved in the September session (1928) of the Council, when the disputants agreed to resume direct negotiations in a neutral city, each of them reserving his point of view as to the legal position, whilst the President of the Council declared that, judging from the documents before him, there was a fair prospect of settlement.

If the Council had proceeded to appoint the auxiliary judges, these amicable negotiations would not have taken place. The arbitral process would have been resumed compulsorily, Rumania refusing to recognize the competence of the Tribunal—surely a circumstance which would have struck a damaging blow at the system of arbitration, and it was this damage that the Council obviated by its policy of exercising a wise discretion in applying Article 239.

The Council indeed exercised its discretionary powers with extreme caution. It did not encroach upon the competence of the Tribunal, not only to try under certain conditions cases affected by the Agrarian Reform, but, its freedom to try the cases in the light of the rules of international law which the Tribunal deemed to be appropriate; the Council only went so far as to suggest that the minutes of the discussion and its resolution of September 1927 (respecting the principles of the arbitration), which had 'value', should be submitted to the Tribunal, that is to say, a discussion in which individual members—not the Council—expressed their views of the legal position as to the principles governing the arbitration.

On the other hand, it fulfilled its essential function as a mediator under Article XI of the Covenant in refraining from nominating the auxiliary judges—Article 239 of the Treaty of Trianon, according to Professor Brierly, permitting the exercise of such discretion—and thus refusing to coerce Rumania to undergo an arbitration the result of which might disturb international peace or good understanding.

Section 2. THE LIMITATIONS OF THE DIRECT METHOD—ILLUSTRATED BY THE QUESTION OF THE PARTITION OF UPPER SILESIA (1921)

The Council's direct method, of which the Hungarian optant case furnishes an apt illustration, is suitably employed when a political compromise has to be effected. The Council in such a case attempts by diplomatic means to induce the parties voluntarily to make 'out of court' (by which one means apart, it may be, from any consideration of treaty rights) a fresh political arrangement, based upon mutual concessions.

If, on the other hand, the Council is faced with the task of making a recommendation which (1) the parties have agreed in advance to accept, and (2) has to be based on ascertained fact and treaty provisions, the circumstance *prima facie* calls for the more elaborate methods available to the Council—the quasi-arbitral methods, which we have already discussed in Chapters II and III, of dependence on the Report of a Commission of Inquiry or an advisory opinion of the Permanent Court.

The only notable case in which conditions (1) and (2) above were present, which, notwithstanding, the Council settled by its direct method, was that of the partition of Upper Silesia.

The Elements of the Upper Silesia Dispute.

No question could have been more difficult. The first draft of the Treaty of Versailles had allocated the whole of the region to Poland, and Germany, crushed by an overwhelming defeat, ready, it seemed, to accept every demand of the Allies, would at no cost accept this provision, and declared that it would refuse to sign the Treaty of Versailles if the clause remained. The Poles had not ruled in Upper Silesia for 700 years: the region had been subject to German influence, economic and cultural, for centuries before Frederick the Great annexed the region in 1742; it was one of modern Germany's richest industrial

assets, containing 25 per cent. of its coal and a large proportion of its zinc and iron ore.

To induce the Germans to sign the Treaty of Versailles, Mr. Lloyd George offered them a plebiscite, which resulted in a victory for Germany, 717,000 voting for Germany, 438,000 for Poland. The voting had been by communes, and Polish communes were in certain areas inextricably mixed up with German. 'German towns had Polish village communities hanging on their fringes and outskirts. No clean-cut division of the area could be arrived at which would not have the result of leaving large Polish minorities in German territory and vice versa.' [1]

On the basis of the vote, the Allied Commissioners could not agree on a frontier, and in the meantime a Pole named Korfanty, emulating the example of his compatriot Zeligowski,[2] tried to take the law into his hands and occupy the region. The comments of the British Prime Minister, Mr. Lloyd George, and of the French Press on this raid—the former bluntly condemning, the latter applauding—illustrated the grave divergence which separated the two Allies. The French attitude was based on a desire to deprive Germany of the coal, iron, and zinc of Upper Silesia—the raw material of her future munitions—as a measure of security; this safeguard the French were prepared to forgo only if the United States of America and Great Britain guaranteed France against unprovoked aggression from Germany. Great Britain stood by the text of the Treaty of Versailles.

The difficulty of drawing a line was due not only to the absence of a clear-cut division between the voters, but also to the fact that to the east of a Polish area lay a German area which was a veritable network of railways, industries, water and electric power, mining systems, all so closely

[1] See *Second Year of the League*, by H. W. Temperley, pp. 107–27, Chapter VII, Upper Silesian Award; but Mr. Temperley tends to overdraw the picture when he refers to the mixture of populations as analogous to 'shot-silk colours'. This is to exaggerate the difficulties of the problem.

[2] See p. 94.

bound and interrelated as to be regarded as indivisible, giving rise to the question of 'the indivisibility of the industrial triangle', the British experts contending that the whole triangle should go to Germany, the French, for the reason stated, wishing to allot it to Poland, irrespective of how the inhabitants of the triangle had voted.

Relations between France and Great Britain grew strained, and the failure to agree seemed likely to lead to a rupture when, on the suggestion of Mr. Lloyd George, the question was referred to the Council of the League by the Supreme Council of the Allies (France, Great Britain, Japan, and Italy).

The Council's handling of the Dispute

To find a pacific solution of such a problem in these circumstances was truly a formidable task for an institution which was just twelve months old.[1]

The Council handled the question in a rather unique way. It did not consider that the circumstances called for the usual conciliatory procedure provided for by the Articles of the Covenant; in its view it was not faced with the duty of inducing two parties to agree, but to give an opinion on the frontier, an opinion which would have the effect of a binding award, the members of the Supreme Council having undertaken in advance to accept its recommendation.

[1] The terms of the reference to the League were as follows: 'The Supreme Council, before deciding on the fixing of the frontier between Germany and Poland in Upper Silesia in conformity with Articles 87, 88 of the Treaty of Versailles, decides by application of Article XI, paragraph 2, of the Covenant of the League of Nations to submit to the Council of the League the difficulties the fixing of this frontier present, and to ask it to make known its recommendation as to the line the Principal Allied and Associated Powers should lay down.'

M. Briand, the President of the Supreme Council, added in an accompanying letter, 'each of the governments represented having solemnly undertaken to accept the solution recommended by the Council of the League'.

Accordingly, when the Council of the League met in Extraordinary Session (August 24, 1921), its position was rather curious. No States parties to the dispute were present to give their case: the Council did not hear representatives of either of the countries most directly affected, namely, Germany and Poland. When any dispute is referred by third parties to a Council, the disputants have the right to be present in accordance with Article IV, paragraph 5, of the Covenant, and if one of the disputants is a non-member, Article XVII confers upon him, once the Council is 'seised' of the dispute, the right of being invited to accept the obligations of membership.[1] The explanation given by the Council for deciding not to hear either Poland or Germany was as follows. 'This question', stated the Council in a *communiqué* to the Press, 'has been referred to the Council of the League by the Supreme Council, not by Poland or Germany. In accordance with the Treaty of Versailles, signed by Poland and Germany, it is the duty of the Powers represented on the Supreme Council to determine the frontier line in Upper Silesia. From the point of view of the Council of the League it is not a question of a Polish-German conflict or of arbitration between disputants, it is a question of formulating the recommendation to the Supreme Council at its request regarding the application of one of the clauses of the Treaty of Versailles.'

Although admittedly the difficulty was a real one, it was surely desirable that representatives of the two countries should be heard: a lasting settlement must have some dependence on the attitude of Germany and Poland to any recommendation the Council might see fit to make. If the Council, as the last sentence of its explanation seemed to imply, was not concerned with effecting an agreement between Poland and Germany, but had virtually to give an arbitral award, it could have heard both Governments (and so acted in a way consistent with the

[1] See Chapter II, Part I, p. 25.

spirit of the Covenant), without thereby diminishing its authority to take a decision.[1]

Again, neither France nor Great Britain, whose divergent views had prevented a settlement, were apparently regarded by the Council as disputants in the case. Viscount Ishii, the acting President of the Council, invited neither the one nor the other to state a case.

The minutes of the Extraordinary Session, held in private, show that there was little discussion at the Council table. The Council met to decide that the question be submitted to a Committee of four of its members for impartial investigation, and on the basis of their report a decision would be taken.

The intention was no doubt excellent. The four members belonged to countries which 'had so far taken no part in the preliminary investigations',[2] Brazil, China, Spain, and Belgium.[3] A Committee of this character, consisting of three diplomats (the Ministers of Brazil, China, and Spain accredited to Paris) and one Foreign Minister (M. Hymans), would have been more suitable if the Council was faced with the task of conciliating two disputant States, or effecting a political compromise. Their honest efforts must be cordially acknowledged; the suspicion entertained by many writers to the effect that the four members of the Council were each, owing to their individual positions, partial to the French view must at once be repudiated. The objection, if objection can be laid,

[1] The omission is all the more surprising in view of the fact that the Extraordinary Session was held under the chairmanship of Viscount Ishii at a time when the Council was meeting in regular session under Mr. Wellington Koo, and lends colour to the view that the Council seems to regard itself as meeting specially as a kind of arbitral commission in response to the appeal of the Supreme Council.

[2] P. V. C. Extraordinary Session, Aug. 29 to Oct. 12, 1921, p. 4.

[3] Their duties included a study of the various aspects of the problem with the help of the documents forwarded by the Supreme Council, to obtain expert advice preferably from those who had taken no part in the investigations and discussions, and to hear, if desirable, inhabitants (German or Polish) of Upper Silesia . . . and to report to the Council. P. V. C., ibid., p. 4.

lies deeper; a Committee of the Council consisting of diplomatists and politicians was possibly not the most appropriate means available to the Council. It would have been preferable for many reasons to have resorted to an expert Commission of Inquiry consisting of a varied personnel adequately equipped to unravel the intricacies of this most difficult problem. For the task was not to effect an arbitrary political compromise, but to make a proposal—a virtual award—based on facts that had been objectively ascertained, namely, the facts of the plebiscite, revealing the wishes of the population, and to interpret those facts in accordance with Treaty provisions.[1] To carry out this work efficiently would have necessitated a study of conditions on the spot before venturing to recommend a frontier; however well documented a Committee may be, even although armed with the results of a plebiscite, it would not otherwise be properly equipped for the task.

Much has been written about the justice or injustice of the Committee's recommendation.[2] After this lapse of

[1] Treaty of Versailles: Annex 5 to Article 88: 'The result of the vote will be determined by communes according to the majority of votes in each commune.... On the conclusion of the voting, the numbers of votes cast in each commune will be communicated by the Commission to the Principal Allied and Associated Powers, with a full report as to the taking of the vote and a recommendation as to the line which ought to be adopted as the frontier of Germany in Upper Silesia. In this recommendation regard will be had to the wishes of the inhabitants as shown by the vote, and to the geographical and economic conditions of the locality.'

[2] For exact description of line see (1) *History of Peace Conference*, vol. vi, B. map, p. 265, also Appendix; (2) P. V. C., Extraordinary Session of the Council, 8. 29, 1921; (3) vide *Second Year of League* (Temperley), p. 117. 'The frontier line recommended by the League showed that nationality was superior to coal, to transport, to geographical convenience. In the second place the League decided to divide the industrial triangle. They lopped off one big angle—consisting of the two almost exclusively German towns of Königshütte and Kattowitz—and gave it to Poland: Beuthen and Gleiwitz, the other two angles, remained to Germany.' Most of the mineral and industrial riches of the region were included on the Polish side of the line, comprising, according to German figures, '85 per cent. of the coal-mines, 67 per cent. of iron furnaces, all lead and zinc pits, all zinc works, and all zinc plate rolling works' (p. 118, ibid.).

time, facts justify the reduction of the controversy to one issue, for it must be admitted that the decision to run the frontier line through the middle of the industrial triangle, though ruthless and resulting here and there in absurdities, has proved in practice to be workable: the elaborate provision made by the League to ensure an economic unity in the areas which it politically separated have been shown to be more or less a success.[1] Such a partition was dictated by a desire on the part of the Committee of Four to attach greater weight 'to the wishes of the inhabitants as shown by the vote' than to the 'geographical and economic conditions of the industry'. That some partition of Upper Silesia was necessary, if satisfaction was to be given to the voters, is generally accepted. The Committee cannot be blamed for rejecting the French proposal to hand over two-thirds of the region to Poland, nor the German view, which supposed that the plebiscite required its attribution *in toto* to Germany. It should be remembered that the Supreme Council's Commission of Experts had themselves agreed that the result of the plebiscite justified partition in accordance with the Treaty of Versailles; the League line in fact ran between the lines suggested respectively by the French and British at their meetings in August 1921.

We are thus left with the question whether the line actually proposed gave, as was intended, the maximum satisfaction to the inhabitants, and to ascertain the principles which guided the Committee in proposing it. And here possibly we may see that the Committee of the Council fell short of its task.

Perplexed by the difficulties presented by the absence of a clear-cut division between the voters, the Committee finally hit upon the idea 'of assigning to each State a

[1] A convention effecting an arrangement providing for economic unity and safeguarding the rights of minorities was negotiated at Geneva under the Chairmanship of M. Calonder (late Swiss President) on behalf of the Council. The Convention which 'contained 606 Articles and was more voluminous and more technical, if not more complicated, than the Treaty of Versailles—was signed by Polish and German representatives at Geneva'. *Survey of International Affairs*, 1920–3, A. J. Toynbee, p. 269.

number of electors not differing appreciably from the total number of votes given in its favour and which would, at the same time, as far as possible equalize and reduce the minorities';[1] in other words, a line which left on the German side about 60 per cent. of the inhabitants and on the Polish side 40 per cent.[2] Now this was a very rough and ready principle and indicated no particular line: in fact there were innumerable lines that could satisfy the condition. If we take an analogy from geometry, the condition was equivalent to establishing a single point in space through which an infinite number of lines can be drawn: to determine a line in geometry one needs two points.

The proportion of inhabitants to be left on either side of the line furnishes only one point or condition: what was the other point or condition which guided the Council in its choice? This question cannot be answered, for no further information is given in its report and no minutes are available—it is extraordinary to note—of the meeting of the Council (October 12, 1921) which adopted the proposal.

The absence of the second point or condition would leave room for the play of political factors of an extraneous character, not justified by the Treaty. It is extremely difficult to say what precisely took place within this margin of free decision. The representatives of France, M. Bourgeois, and of Great Britain, Lord Balfour, were informed daily of the progress of the Committee of Four who carried out their investigations at Geneva during the regular session of the Council, and during that time both these distinguished representatives were in constant touch with one another, determined, in the words of M. Bourgeois, 'de ne laisser, en aucun cas, séparer l'action de la France de celle de l'Angleterre, et persuadé que c'est de cette étroite union entre nos deux pays que dépendait le

[1] P. V. C., Extraordinary Session, 1921, p. 17.

[2] The plebiscite vote showed roughly that proportion—717,000 for Germany, 438,000 for Poland.

résultat d'une négociation, qui intéressait au premier degré la paix du monde'.[1] It is therefore conceivable that, subject to the single condition laid down, the Committee decided upon a compromise satisfactory to these two great Powers alone.

It is clear, at all events, that the Committee had not laid down necessary and sufficient conditions according to which the plebiscite could be objectively interpreted, and the line as drawn cannot be said to afford the maximum satisfaction to the inhabitants: any line of course would have left *island* groups of minorities on either side; these were unavoidable, but to have allowed a large, densely populated *salient* of Germans to jut out into Poland, artifically detached from its densely populated main area of Germans in Germany, was more questionable.[2]

This is the kind of arrangement which gives rise to irredentist problems, and might have been avoided if the problem had been assigned by the Council to a neutral Commission of Inquiry, as it did later in the Mosul case, which presented a rather similar problem. A neutral Commission of Inquiry presided over by, say, an American citizen (as in the Memel Commission), would have proceeded to the spot, worked out a scientific application of the plebiscite, and, if we are to judge from both the earlier Aaland case and later Mosul case, would have consulted also the Governments of Poland and Germany in their respective capitals, as well as the Allied Commissioners who had spent several months in the region prior to, and

[1] *L'Œuvre de la Société des Nations*, Léon Bourgeois.

[2] If one plots a map of the position based on the votes of the communes, the salient will be evident: the League frontier runs between Beuthen and Königshutte, cutting in two a large, densely populated German area: as the Committee of the Council were, as they avowed, concerned more to satisfy the wishes of the populations than economic or geographic requirements, they should at least have run the line so as to include the densely populated hinterland of Konigshütte and Kattowitz: such a solution would have left only a comparatively small island—not a salient—of densely populated Poles between Beuthen and Konigshütte in Germany, and would have been fairer to the populations concerned.

during, the plebiscite, and who were intimately acquainted with the situation: the Committee of the Council consulted none of these groups.

The problem called for the quasi-arbitral instruments available to the Council, and was not suitable for an inquiry by a Committee of its members, whose summary efforts could scarcely avoid a crude application of the facts of the plebiscite.

V

RESTRICTIONS ON THE COMPETENCE OF THE COUNCIL TO MAKE RECOMMENDATIONS

Section I. INTRODUCTION

THE competence of the Council to deal with a dispute is subject to several restrictions, the most important of which is laid down in paragraph 8 of Article XV of the Covenant: 'if the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement'. As we shall see later, the question whether any particular matter is proper to the exclusive jurisdiction of a State is essentially a legal question, and the Council on every occasion (except one) on which the plea of domestic jurisdiction has been raised has sought the help of the Permanent Court to provide, by means of an advisory opinion, an answer to it.

The competence of the Council is restricted by another principle, which the Council on two or three occasions has established as the intention underlying the words italicized in the following paragraph 1 of Article XV: 'If there should arise between the Members of the League any dispute likely to lead to a rupture, *which is not submitted to arbitration or judicial settlement*, in accordance with Article XIII, the Members of the League agree that they will submit the matter to the Council.' The Council, in other words, does not consider itself competent to attempt the settlement of a dispute which is already being dealt with by an arbitral body.

Another restriction may arise from rules which it has itself formulated, for instance, in regard to the settlement of minority questions. The Council will not settle a

minority question, although submitted to it by a State under Article XI, unless peace is so gravely menaced as to warrant such a step.

The practical significance of these restrictions will be discussed below in their turn. They have a common characteristic, namely, that the Council is sole judge of the question whether these restrictions apply to any particular case and its decision need not be dependent upon the approval of the parties, as it is usually one of the parties which contests the competence of the Council. Indeed, on one occasion, when arriving at a decision in regard to its competence, the Council has taken a unanimous vote without reckoning the votes of the parties. This occurred in the Aaland Islands dispute, when the Council noted the Report of the jurists, which declared that, contrary to Finland's claim, it was competent to deal with the question; the President, M. Bourgeois, stated that, in accordance with Article XV, the votes of the parties were not required in reckoning unanimity.

Competence—the Right of Preliminary Investigation by the Council

It is not enough for a party to appear before the Council and to declare that the question is, for example, a matter of domestic jurisdiction, for all discussion forthwith to cease. The Council has to satisfy itself of the soundness of that claim; in the words of Article XV, paragraph 8, of the Covenant, the claim is upheld if the dispute '*is found by the Council* to arise out of a matter which by international law is solely within the domestic jurisdiction' of the party.

In the Greco-Turkish dispute (the expulsion of the Oecumenical Patriarch) this right of the Council was specifically noted. On that occasion M. Unden, the representative of Sweden, secured an amendment to the form of the request for an advisory opinion in order to safeguard that right.[1]

[1] O. J., 33rd Session of the Council, p. 488.

Referring to the request, 'Is the Council of the League of Nations empowered by the Covenant to discuss the question placed on its agenda at the request of the Greek Government?', M. Unden observed that the Council clearly had this right. It was the right to proceed farther as a result of that discussion which was at issue, 'and he proposed that the wording of the request should be amended, so as to make the position clear', and the Council agreed to adopt a new draft.[1]

Conversely, the mere fact that a party has brought a dispute before the Council does not preclude the other party, if he has grounds for doing so, from challenging the competence of the Council in accordance with paragraph 8, Article XV. In the advisory opinion given by the Court on the Tunis Nationality Decree question an interesting passage occurs: 'It is certain—and this has been recognized by the Council in the case of the Aaland Islands[2]—that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article XV.'

A want of appreciation of this principle prevented the Turkish Government from appearing before the Council in the dispute with Greece (the expulsion of the Oecumenical Patriarch) on March 14, 1925. In a letter addressed to the Secretary-General, whilst being careful to say that it had 'the greatest respect and esteem for the League of Nations', and had 'on several occasions even suggested of its own accord' to bring matters before the Council, the Turkish Government regretted that it could not agree to the questions affecting the Patriarch 'being laid before the Council of the League of Nations. Were

[1] 'Do the objections to the competence of the Council raised by the Turkish Government in its letter of March 1st, which is communicated to the Court, preclude the Council from being competent in the matter brought before it by the Greek Government by its telegram to the Secretary-General of the League of Nations dated Feb. 11, 1925?'

[2] See p. 153.

it to take any other line, the Turkish Government would first of all be agreeing to the interference of Greece with its internal affairs. . . .'[1]

It is significant that it was on this occasion that the Swedish representative on the Council, as we have just seen, made the position clear as to the Council's right itself to judge whether or not it was competent in such cases to deal with the question.

Section 2. DOMESTIC JURISDICTION

The meaning of the plea of 'domestic jurisdiction', which, if sustained, removes a dispute from the competence of the Council, in accordance with paragraph 8, Article XV, has been a subject of some difficulty. The practice of the Council is not rich in examples: in three cases only[2] has action been based on the clause. Much can, however, be gleaned from a close examination of the French Nationality Decree question, which gave rise to a dispute between France and Great Britain in 1922. The issues are summarized in the foot-note.[3] The advisory

[1] O. J., Minutes, Apr. 1925, p. 581.

[2] 1. Aaland Islands (Finland and Sweden), 1920.
2. French Nationality Decrees (France and Great Britain), 1922.
3. Expulsion of the Oecumenical Patriarch (Greece and Turkey), 1925.

[3] French Nationality Decrees (issued in Tunis and Morocco). Mr. Fachiri (*Permanent Court of International Justice*, pp. 144–56) thus summarizes the issues in dispute:

'On Nov. 8, 1921, two decrees were issued in the French Protectorate of Tunis, one by the Bey, the other by the President of the French Republic, whereby French nationality was imposed upon all persons born in Tunis of parents justiciable by the French Courts, also born there, and Tunisian nationality upon all persons so born whose parents were not so justiciable. The effect of these decrees, so far as material, was to attach French nationality and its subsequent obligations, including military service, to a considerable number of British subjects (principally of Maltese origin) established in the country. . . .

'The British Government protested. . . . The question at issue was, in substance, this: Was it in accordance with international law for France to impose her nationality upon British subjects in Tunis and Morocco, being territories not under her sovereignty but under her protection? In order

opinion given by the Permanent Court throws considerable light on the meaning and scope of the paragraph, and is especially useful since, in the words of Sir Cecil Hurst, the legal adviser to the British Foreign Office, and himself one of the distinguished drafters of the Covenant, 'it has never been clear what disputes the framers of the Covenant regarded as solely within the domestic jurisdiction of a State'.

A brief glance at the proceedings will bring out the significance of the clause.[1]

Sir Douglas Hogg, the British Attorney-General, who argued the case for Great Britain, held that the merits of the dispute were not before the Court. 'It was not in issue whether the Nationality Decrees were just or proper. . . .' France might be right in imposing the decrees—that depended on treaty obligations and interpretation of treaty provisions.[2] But whatever view one might take of France's action, it was sufficient to establish the *dependence* of that view on the interpretation of treaties, 'in order to take the matter out of the exclusive domestic jurisdiction of

to decide this question it was necessary to consider, besides general principles of international law, the interpretation and effect of a number of treaties between (*a*) the Protected States and Great Britain, (*b*) the Protected States and France, (*c*) Great Britain and France, and (*d*) France and other Powers, under which Great Britain claimed most favoured nation privileges.

'The French contention was that her rights in the Protectorates were such that it was not only permissible for her, in conjunction with the local sovereign, to enact the legislation in question, but that this action was entirely a domestic matter in which Great Britain was, by international law, not entitled to interfere. Great Britain, on the other hand, maintained that the relevant treaties gave her rights which the Decrees infringed, and disputed the French view of the law.'

As we have seen (p. 12), the French refused the direct arbitration of the Court, and Great Britain accordingly exercised her unilateral right of compelling inquiry by the Council under Article XV, par. 1, whereupon both Governments at once agreed to suggest that the Council should ask for an advisory opinion.

[1] The case has been fully discussed by Mr. Fachiri in his work, *Permanent Court of International Justice.*

[2] See footnote above.

France, without it being necessary to decide what the true meaning of the treaties was'.

Counsel for France, M. de Lapradelle, held, on the contrary, that in order to decide the preliminary question, 'it was necessary to investigate and decide the merits of the whole dispute', and this he proceeded to do, examining all the treaties in the case and contending that they conferred no special rights on Great Britain, and that therefore the decrees were of purely French domestic concern.

If the French contentions were upheld, questions of competence might easily shade into questions of substance. M. de Lapradelle, in fact, stated that the Court was confronted by a 'véritable procédure d'arbitrage'. If the French were right in holding that it was necessary to examine and pronounce on the substance of the question before the preliminary question could be decided, the Council might, by utilizing paragraph 8, Article XV, obtain in effect a judicial or arbitral award—for such is in practice the force of a substantive opinion—by a side wind, as it were, although ostensibly the question raised might be one of competence.

The Court in its opinion (unanimously arrived at) thus answered the French contention:

> 'The Court has to give an opinion upon the nature and not upon the merits of the dispute. . . . The Court therefore wishes to emphasize that no statement or argument comprised in the present opinion can be interpreted as indicating a preference on the part of the Court in favour of any particular solution as regards the whole or any individual point of the actual dispute. . . .
>
> 'The Court holds, contrary to the final conclusion of the French Government, that it is only called upon to consider the arguments and legal grounds advanced by the interested Governments in so far as is necessary in order to form an opinion upon the nature of the dispute.'

The substance of the dispute is, therefore, not necessarily in question when the plea of domestic jurisdiction is raised. For, in the words of the Court, 'the question to be considered is not whether one of the parties to the

dispute is or is not competent in law to take or refrain from taking a particular action, but whether the jurisdiction belongs solely to that party', and in support of this contention the Court draws special attention to the French text of paragraph 8, Article XV, 'une question que le droit international laisse à la compétence exclusive de cette partie'.

Examining the arguments of both parties, the Court found that each of them, French as well as British, is based on a question of international law, namely, on the interpretation of treaties bearing on the particular issues, and proceeded [1] to establish the fact that the dispute was not, by international law, solely a matter of domestic jurisdiction.

'From these proceedings it is evident that a matter of 'domestic jurisdiction' may mean anything which is not regulated by international law, that is, anything which is within the exclusive jurisdiction of the State, and the word 'domestic' may not be used in the sense of the internal affairs of a nation. Indeed, paragraph 8 would probably be equally effective if the word were omitted—'a matter which by international law is solely within the jurisdiction of that party'.

Professor Brierly quotes a useful phrase, attributed to Professor Borchard of Yale, in support of this view. The latter regards domestic jurisdiction as 'the sum total of national interests minus the interests governed by International Law.' Dr. McNair also adheres to this view in his edition of Oppenheim's *International Law*.

Paragraph 8 must, then, exclude many questions of moment to the peace of the world from the competence of the Council. For decidedly there are many matters within the exclusive jurisdiction of a State which give rise to dangerous international disputes.

As Professor Brierly points out,[2] 'the greater part of international relations does not fall within the regulating

[1] See Fachiri, *Permanent Court*, &c., p. 154.

[2] J. L. Brierly, *Law of Nations*, p. 53. Clarendon Press.

influence of international law at all. The conduct of a State is not brought under international law merely because it affects the interests of other States; this may be true and yet the matter in question may fall within what is called the "domestic jurisdiction" of a single State. For example, legislation restricting immigration into the United States is not a matter which affects American interests only. On the contrary, it has created most serious difficulties for countries such as Italy, which have a surplus of population. This latter fact is, however, irrelevant from a legal point of view, for immigration . . . is a matter entirely outside the control of international law. Other illustrations of matters which at present belong to "domestic jurisdiction" and not to international law are a State's treatment of its own subjects, its choice of a form of Government, its naturalization laws, although its action on any of these matters may easily have repercussions on the interests of other States. But the most serious limitation on the range of international law is that the whole sphere of international economic relations, except in a few cases . . . belongs to domestic jurisdiction'.

Are we, then, in the presence of a grave restriction on the powers of the Council to maintain peace? No case has occurred in which the Council has had to uphold the plea of domestic jurisdiction, and we cannot judge from the practice how effective its action would be if paragraph 8 were affirmatively applicable to the case. But in such an event some action the Council would necessarily take and has the right to take. For if we observe carefully the clause, it merely withdraws from the Council the right of making a recommendation: 'It shall make no *recommendation* as to the settlement of the dispute.'

As Dr. McNair states: 'It is only the power of the Council to make recommendations for a settlement which is ousted by a successful claim by one of the disputants that the matter is within its domestic jurisdiction. The function of the Council as a conciliator remains.' [1]

[1] Oppenheim's *International Law*, vol. ii, p. 68.

The Aaland Islands dispute shows what possible action the Council might take if peace were threatened. A memorandum written by the Secretary-General, which guided the Council in its conduct of that case, contains the following paragraph:

'If the Finnish claim is admitted (as to the incompetence of the Council in virtue of paragraph 8, Article XV), the Council will have to consider whether it can deal with the matter in any other way than by endeavouring to effect a settlement of the dispute under the third paragraph of Article XV. *This will depend on whether the Council considers that a threat of War is involved. Should the Council so decide, it is its duty to take any steps under paragraph* 1, *Article XI, that it may deem wise.*'

The President of the Council (M. Bourgeois) at the time of the Aaland dispute also stated:

'In any kind of dispute, whatever the acts of sovereignty might be which were exercised by a country within its frontiers, the Council of the League might, in cases where there resulted from these acts an agitation in neighbouring countries, consider whether it was not bound to intervene in the interests of peace, basing its intervention not on the ground of right, but on that of the general duty of the League to secure the peace of the world.'

We have seen in Part II of this study what powerful political influences can be set in motion under Article XI —influences which must at times induce a party to make concessions to another, even against his will. And as questions which may fall within the exclusive competence of a State form the very class that is likely to be most dangerous to peace, and are consequently not excluded from action under Article XI, we may regard the harmfulness of 'domestic jurisdiction' as being greatly limited.

There are other considerations which diminish the importance of the clause. The first is clearly stated in the opinion of the Court in the Tunis Decree case.

'Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration . . . shall be laid before the Council. The reservations' —(e.g. as to vital interests)—'generally made in arbitration treaties

are not to be found in this Article. Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of States . . . in paragraph 8, Article 15. It must not however be forgotten that the provision contained in paragraph 8 . . . is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.'

The second consideration is based on the fact that the domain of international law is continuously increasing, and that the matters which are exclusively within the jurisdiction of a State are correspondingly decreasing, as Professor Baker shows in an illuminating essay in the *British Year Book of International Law* (1925).[1]

Section 3. COMPETENCE OF THE COUNCIL—IN CASES WHICH ARE SUBMITTED TO ARBITRATION OR JUDICIAL SETTLEMENT

As we have mentioned in a previous page, the competence of the Council is restricted by the terms of Article XV, paragraph 1, which gives any Member the right to refer a dispute to the Council, 'which is not submitted to arbitration or judicial settlement'.

The significance of the clause was tested in the dispute between Italy and Greece (see p. 73), when Italy questioned the competence of the Council to deal with the issues referred to it by Greece in accordance with Article XV, on the ground that the Ambassadors' Conference was seised of the matter. The peculiar circumstances under which the Council acted have been fully described: it attempted to settle the substance of the dispute in spite of Italy's objection to its competence—an objection which the Council did not examine. On every other occasion on which its competence has been questioned on this ground, the Council has invariably examined the preliminary question, before trying to settle the substance. In the Corfu case, the Council's conduct was unusual, and was dictated by a feeling that it must do something in face of the war-

[1] See J. L. Brierly, 'Domestic Jurisdiction', *Year Book of International Law*, 1925.

like act of Italy; as it dared not challenge Italy's action under Article XI, it followed the line of least resistance and discussed what had given rise to Italy's action, but this, as it happened, was the question of which the Ambassadors' Conference had been 'seised'. Little profit can be obtained from the practice of the Council in this case: its conduct on that occasion caused such doubts that a special commission of jurists was charged with the task of laying down principles for the future guidance of the Council, one of which is germane to this section. 'Is the Council,' the lawyers were asked,

'when seised of a dispute in accordance with Article XV, paragraph 1, of the Covenant, at the instance of a Member of the League of Nations, bound, either at the request of a party or on its own authority, to suspend its inquiry into the dispute, when, with the consent of the parties, the settlement of the dispute is being sought through some other channel?'

The reply, which was unanimously noted by the Council, read:

'"Where, contrary to the terms of Article XV, paragraph 1, a dispute is submitted to the Council on the application of one of the parties, where such a dispute already forms the subject of arbitration or of judicial proceedings, the Council must refuse to consider the application.

'If the matter in dispute, by an agreement between the parties, has already been submitted to other jurisdiction before which it is regularly proceeded with, or is being dealt with in the said manner in another channel, it is in conformity with the general principles of law that it should be possible for a reference back to such jurisdiction to be asked for and ordered.'

This ruling was accepted by the Council as a general principle of interpretation of Article XV, paragraph 1. Its binding character must not, however, be exaggerated. It is a ruling which the Council may or may not judge to be the governing principle in a particular case.

On the occasion of the dispute between Greece and Turkey over the delimitation of frontier along the

Maritza,[1] the Council strictly applied the jurists' ruling and refused to deal with the question submitted to it by Greece in accordance with Article XI, on the ground that the Mixed Commission was alone competent under the Treaty of Lausanne to decide the matter in dispute, which it referred back to the Commission. The Council's resolution shows that interference with the work of an arbitral tribunal could only be justified if the latter had abused its powers. If Article XI does not apply, the arbitration must proceed, provided the arbitral tribunal is not exceeding the powers conferred upon it.[2]

[1] The Greek Government, March 16, 1926, questioned the validity of a map attached to the Treaty of Lausanne—Greece held it was not in perfect agreement with the text, Article 4 of that Treaty—in accordance with which the Mixed Commission was delimiting the frontier between Greece and Turkey along the Maritza, and referred the question to the Council under Article XI, interrupting the arbitral proceedings of the Commission. Greece furthermore wished the Council to ask the Court for an advisory opinion on the question submitted. Turkey questioned the competence of the Council, held that the Mixed Commission should decide the question, and recalled the ruling of the jurists of Mar. 17, 1924, in the light of which the dispute was brought before the Council 'contrary to the terms of Article XV, par. 1, of the Covenant, and it was the duty of the Council to refuse to proceed with the examination of that request.' O. J., Apr. 1926, p. 515.

[2] The Council had entrusted three jurists attached to the Delegations with the duty of drawing up a report on the question of its competence, and the report was finally adopted by a unanimous vote, the two parties also approving. The relevant passages read as follows:

'The jurists considered that before proceeding to examine the arguments put forward by each of the two parties in support of its interpretation of the delimination clause in question (i.e. the substance of the dispute), and before discussing the possibility of referring that question to the Court for an opinion, the Council must decide as to the plea of incompetence urged by the Turkish Government.... In the jurists' opinion, it is for the Commission itself, under the terms of Articles 2, 4, 5, and 6 of the Treaty of Lausanne to delimit the frontier ... and the map attached to the Treaty should, in accordance with opinions of the Permanent Court of International Justice, be regarded as highly important though not conclusive. The Commission has power to take a decision by a majority vote....

'It is only when the Commission has exhausted all these sources of information and announces that it has such serious doubts that it is unable to decide on these questions, or if it has flagrantly exceeded its powers, that

In the *Salamis*[1] case again, the Council preferred to rely on the opinion of its own jurists rather than ask for an advisory opinion to decide the question of its competence *vis-à-vis* that of an arbitral tribunal. The Rapporteur's Committee of Three Members of the Council, finding that it was extremely difficult to appreciate the legal elements affecting the relative duties of the Council and those of the Mixed Arbitral Commission, proposed that the Court should be asked for an advisory opinion to decide the question. But the Council thought the circumstances called for its direct methods. On this occasion several members—M. Loudon (Holland), M. Scialoja (Italy), Herr Streseman—insisted that the Council was sole judge of its competence, whilst Herr Streseman pointed out the absurdity of asking the Court for an advisory opinion on the question whether the Council was in order in asking for an opinion (the Greek request for an opinion interpreting Article 190 of the Treaty of Versailles being the substance of the dispute). Further differences were shown on the question of voting for a request for an advisory opinion, some members holding the view that unanimity

the Parties would be justified in attempting to reach a settlement of such difficulties in accordance with international law.

'The jurists consider that, in the absence of the circumstances indicated above, the Council cannot at present deal with the question under Article XI, par. 2, of the Covenant to which the Greek Government has referred.' O. J., Apr. 1926, p. 520.

[1] On June 24, 1927, the Greek Government requested the Council to give a ruling on the question whether the Clauses in Articles 190 and 192 of the Treaty of Versailles prohibiting the construction of warships or naval war material in Germany and their export to foreign countries applied to vessels whose construction had been undertaken by German shipyards under contracts concluded before Aug. 1, 1914. The dispute was between the Greek Government and a German firm which wished to adhere to a contract made with Greece in 1914 to construct the cruiser *Salamis*—a contract which had been interrupted by the Great War. The Greek Government hoped the Council would request the Permanent Court for an advisory opinion on the question. Although the German Government refused to regard itself as a party to the dispute, Herr Stresemann held the view that the Mixed Arbitral Commission set up to decide such questions was alone competent.

was necessary, even although the opinion desired related to competence, and other members (M. Scialoja) holding that a majority vote would suffice. In the end, the Council decided to refer the question of its competence to a committee consisting of the legal advisers attached to each member of the Council, and a relevant paragraph of their conclusions (accepted by the Council) is here given, as it throws further light on the question of the Council's competence when a case is already being considered by an arbitral tribunal.

'It will not be contested that as a general principle and in the absence of some special attribution of competence the Council should not intervene in a question pending before another international organ such as a Mixed Arbitral Tribunal when

(*a*) the request for the Council's intervention is made by only one of the parties, and

(*b*) the case is being dealt with by that international organ with the consent of both parties and is regarded by it as within its competence.

If this rule were not followed as a general principle the position of all international tribunals would be prejudiced and an intolerable burden would be imposed on the Council of the League of Nations.'

Although this ruling was approved by the Council at the very same session at which the Optants question was considered (when the competence of an arbitral tribunal and that of the Council were in conflict), it should not be regarded as reflecting on the latter case. As M. Scialoja stated: 'The two questions (the *Salamis* and the Optants case) are entirely different, for the competence of the Council in the latter case was determined by Article XI of the Covenant. In the present case (*Salamis*) Article XI has not been invoked by either of the parties. It should not therefore be thought that either has any influence over the other.'[1]

This statement serves to emphasize the ruling of the jurists which implies that no case can be brought before the Council from an arbitral court unless the use of

[1] O. J., Oct. 1927, p. 1404.

Article XI is clearly justified by the circumstances. It will not lend itself to any attempts which will encourage a party, in the words of M. Loudon, as soon as it foresaw an unfavourable judgement to approach the Council, against the desire of its opponent, in order 'to ask for a verdict which in actual fact would set aside the process of arbitration'.

Section 4. COMPETENCE OF THE COUNCIL—MINORITY QUESTIONS

A third class of matters which the Council may decide is outside its competence relates to the settlement of minority questions. In 1928 Albania appealed to the Council in accordance with Article XI in respect of a dispute between her and Greece—arising out of the rights of Albanian minorities in Greece. The Greek representative, M. Politis, questioned the propriety of the reference to Article XI; he asserted that there was no tension of any kind between the two countries, and there was no reason to justify a departure from the normal procedure—namely, the use of the minority machinery set up by the Council. The Council upheld this view and unanimously (inclusive of the disputants) adopted the Report drawn up by the Rapporteur, Sir Austen Chamberlain, and two other members of the Council (M. Zaleski and M. Adatci), the relevant passages of which were:

'We are unanimous in considering that the system of the protection of minorities instituted by the Treaties, while having as its principal object the protection of the minority itself, is also intended not only to prevent the question concerning the protection of minorities from acquiring the character of a dispute between nations, but to ensure that States with a minority within their borders should be protected from the danger of interference by other Powers in their internal affairs.

'The authors of the Minority Treaty had this object clearly in view. They gave to members of the Council the right to call the Council's attention to any infraction or any danger of infraction of the provisions of the Minorities Treaties. This, however, does not

prevent, under the rules in force, a State not represented on the Council from presenting a petition on the subject of the treatment of minorities.

'The protection of minorities is an international affair, but one of the essential objects of the system established by the treaties and of the procedure laid down by the Council is that, whilst bearing this international character, a case of the protection of minorities should not become a dispute between neighbouring States. Once the matter is before the Council it becomes an affair between the Council and the State to which the minority belongs nationally, not a question between that State and the State with which the minority is racially connected.

'One of the main objects of the system of the protection of minorities would be frustrated . . . if the Council consented to accept as normal an appeal based on Article XI, in lieu of the minority procedure.

Article XI of the Covenant should only be invoked in grave cases which produce a feeling that facts exist which might effectively menace the maintenance of peace between the nations. In normal cases, on the other hand, an appeal to Article XI would create the very dangers which the minority treaties were intended to avert.'[1]

[1] Minutes, O. J., July 1928, p. 943.

VI

THE FORCE OF THE COUNCIL'S FINAL RECOMMENDATIONS

THE Council's methods of arriving at a settlement having been analysed at length, we have now reached a stage when we can profitably examine the force of the Council's final recommendations, which offer to the disputant parties the basis of a settlement following the principles laid down in Article XV, paragraphs 3–7.[1] As M. Mantoux, the late head of the Political Department of the League Secretariat, has indicated,[2] the parties are immediately free to reject the recommendation of the Council if they so wish: it is the validity of a recommendation which is established by a unanimous vote, excluding the votes of the parties. The recommendation becomes binding on the parties only when they accept it. For the action of the Council, acting in pursuance of Article XV, is essentially that of a mediator or conciliator, and its proposals have no legal force, indeed it may modify them again and again, if need be, until they meet with the approval of the parties. Nevertheless special circumstances may invest the recommendation with a more or less obligatory character, and an adequate appreciation of the force of the Council's decision will best be obtained by considering four possibilities:

(1) The recommendation is accepted by both parties.
(2) The recommendation is accepted by one of the parties and rejected by the other.
(3) It is rejected by both parties.
(4) The Council may fail to arrive at a unanimous recommendation (exclusive of the disputants).

[1] See Appendix, The Covenant.
[2] In an address to the Royal Institute of International Affairs, London.

(1) *The Recommendation is accepted by both Parties.*

The Council by various means, by the help of a Commission of Inquiry, or of an advisory opinion, or the mediation of the Rapporteur, is able to propose a solution agreeable to the parties. It then acts in accordance with paragraph 3 of Article XV . . . 'If such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.' Although the paragraph in question makes no mention of a recommendation, the Council, in all its successful cases where the dispute has not been referred to direct negotiation between the parties, does formally propose the solution it thinks fit in the form of a final recommendation which may or may not be accompanied by a Report giving 'facts and explanations regarding the dispute'.

The parties are invited to express their opinions thereon; if they approve, the recommendation is adopted very simply, the President, with uplifted hammer, stating that if the Council agrees the resolution is adopted. If no one speaks, the stroke of the hammer marks the adoption of the resolution, and the unanimous vote of the Council, inclusive of that of the disputants, is assumed. On rare occasions a vote by roll-call is made.

In inviting the parties to agree, the Council, as we have just explained, acts in theory as a conciliator, but the practice shows that in many, if not most, of the important cases successfully settled by the Council the recommendation had been prospectively invested with a quasi-arbitral force. In our review of the choice of methods made by the Council,[1] it will be seen that a large proportion of the cases were settled by resort either to Commissions of Inquiry or to the advisory opinion of the Permanent Court. The virtually binding character of advisory opinions has already been discussed, and it has been shown that when they dealt with the substance of the dispute

[1] See p. 246.

they were equivalent to an arbitral award or decision. The disputants in each of the cases in which a substantive opinion was obtained had consented to the request being made, and so held themselves bound to accept the reply, and, in consequence, the recommendation of the Council which was based on the opinion.

Again, in respect of each of the Commissions of Inquiry, the parties approved the resort to such a method, and to the terms of reference which in each case authorized the Commission to prepare a solution as well as to investigate the facts. In all cases, the impartial authority of the Commissions made the acceptance of their conclusions almost irresistible. M. Branting, for example, in the Aaland case, felt that he could not persist at the Council table in the objections offered in private to the Rapporteur against the Report of the Commission. In the Greco-Bulgar case, the recommendation based on the Rumbold Commission had the character of an arbitral award, the parties having consented in advance to conform to the decision of the Council, and very slight modifications were necessary.

(2) *The Recommendation is accepted by one of the Parties and rejected by the other.*

If one party rejects a recommendation and the other accepts, some writers[1] contend that in so doing he runs the risk of exposing himself to the hostile action of his rival, who may consider himself free to take violent measures to compel acceptance; and if he declares war against the dissentient, the Members of the League are pledged at least not to interfere. This view claims to base itself upon Article XV, paragraph 6, which states that 'if a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the

[1] Dr. Hugh Dalton, *Peace of Nations*, p. 283.

dispute which complies with the recommendations of the report'.

Mr. Noel Baker, in his study *The Geneva Protocol*, similarly interprets the position: 'The party which complies has a right of war against the party which does not.'

The acceptance by League Members of the obligation not to resort to war, assumed in the Kellogg Pact (p. 241), have rendered these views plainly untenable. It is important, however, to observe that prior to this Pact such opinions probably read too much into the clause and conflicted with Article XI, which makes any war a matter of concern to the whole League. Professor Brierly's reading, namely that a 'party which accepts a unanimous report is guaranteed against attack by the other', seems to be more accurate juridically and is certainly more consistent with the practice of the Council.

When we proceed to consider the activities of the Council, we shall be struck with the fact that in no case where a disputant rejected a recommendation, the other complying with it, do we find that the Council disinterests itself in the case and allows the parties to withdraw and take any action they please. In every instance the Council conceives its duty to be to take further action so as to prevent any possible threat to peace. This it may do by resuming a discussion of the issues, and attempting to formulate another solution to the satisfaction of both parties. The dispute between Hungary and Rumania (Optants)[2] furnishes a striking example of such action.

When, in April 1923, the Council proposed the direct reference to the Court of the dispute, Hungary accepted the recommendation, but Rumania refused, whereupon the proposal was dropped and an attempt to find agreement on other lines was made. Again and again the Council, as we have shown in Chapter IV, made fresh proposals which were accepted now by Hungary, and now

[1] J. L. Brierly, *Law of Nations* (1928), p. 213.

[2] See p. 185.

by Rumania, but not by both, until finally the Council's persistent endeavours triumphed in inducing the parties —not indeed to accept any particular solution, but to attempt to arrive at an agreement by private negotiations.

Again, in the Greco-Italian dispute, determined opposition to the proposed solution suggested by the Council (namely, the demands which Greece should rightfully fulfil as reparation for the Tellini murders),[1] led the Council to refrain from formally taking a vote on the question. The Council did not act in pursuance of its powers under Article XV, paragraph 4, namely, to publish the recommendation or report and wash its hands of the affair. It made no report which after three months' delay would release the parties of their obligations not to fight. It confined itself to sending the minutes of its discussions to the Conference of Ambassadors, which in the meantime settled the question.

In the Mosul dispute, the Council, as we have previously noted, did not act in pursuance of the Articles of the Covenant, but was empowered by the Treaty of Lausanne to give an arbitral award, and this it gave although Turkey was absent as a protest against the procedure; after giving the award, the President nevertheless urged the two parties 'to reach friendly agreements in order to put an end to the regrettable state of tension existing between them owing to the dispute for which a solution has just been found'. To which Sir Austen Chamberlain replied that the British Government had no wish to take up a rigid or uncompromising attitude towards Turkey . . . 'and would gladly lend themselves to conversations with the Turkish Government in order to see whether, while taking due account of the Council's decision, it might not be possible to render the relations between the two countries easier and safer, and the British Government would be ready to take into consideration any proposal made by the Turkish Government which is compatible with their duty as mandatory.' These negotiations were subsequently under-

[1] See p. 73.

taken and resulted in a peaceful agreement on the basis of the Council's award.

If the Council has to decide a question which relates only to its competence, the effect of its decision is independent of the dissentient attitude of one of the parties, for obviously when the Council decides unanimously that it will not deal with a dispute, there is nothing more to be said.[1]

Thus in three cases in which one of the parties rejects a recommendation, the Council has avoided recourse to paragraph 4 of Article XV, which would put an end to its procedure of conciliation, and succeeded in obtaining agreement by other means, including mediation in the strict sense.[2]

Another case (Poland and Lithuania) offers an example of an attempt to secure the compliance of the dissentient party by other than persuasive means, namely, a threat made by the President of the Council (M. Viviani) to put into operation the sanctions of Article XVI.

The Council, having failed to settle the fate of the Vilna zone,[3] had recommended that a provisional line of demarcation be drawn, on either side of which the Poles and Lithuanians could restore law and order.[4] The Lithuanian representative refused to agree and even threatened hostile action if the Poles proceeded to administer the territory up to the proposed line in accordance with the Council's resolution. The Council, however, proceeded to vote, and 'the recommendation was adopted unanimously by the Council. As regards the parties to the dispute, it was accepted by the Polish representative, but not accepted by the Lithuanian representative'.[5]

[1] The Albanian-Yugoslav dispute provides an example of such a case. The Council decided it was not competent to deal with Albania's appeal in view of the fact that the Ambassadors' Conference was concerning itself with the matter. Albania did not approve the resolution; it was nevertheless adopted. O. J., Apr. 1921, p. 726.

[2] See p. 9. [3] See Part II, Chapter II, Section VII.

[4] O. J., Mar. 1923, p. 238. Council Meeting Feb. 23, 1923, Paris.

[5] O. J., Mar. 1923, p. 239. (Minutes of the Council.)

The President (M. Viviani) then said[1] that 'as the recommendation had been unanimously accepted, paragraph 6 of Article XV of the Covenant was applicable: consequently if Lithuania opposed by force the execution of the measures provided for, Article XVI would come into play. If Lithuania resorted to war, she would be deemed to have committed an act of war against all other Members of the League.'

This statement should not, however, be considered apart from the views expressed by Lord Balfour (Great Britain). 'Lord Balfour agreed generally with the President's point of view. There could be no doubt, however, that the application of Article XVI raised important legal and other problems on which he wished to consult his Government. Another meeting of the Council would have to be summoned, should any fresh situation arise, before a decision could be taken on the question of applying Article XVI of the Covenant.'[2]

Thereupon the President said that the Council was, of course, willing to hear the parties afresh at a later session. He added that if the Council were informed of an act of hostility by Lithuania against Poland, it would be summoned to meet again immediately. The Minutes declare that the 'Council agreed with the views of Lord Balfour and the President', and as these views were, as the reader will note, rather contradictory, it is difficult to estimate precisely the significance of the position.

It can best be understood if we realize that the Council was here considering a position in which war or threat of war might occur, and that it was not proposing a final settlement the adoption of which would establish legal rights, but it was merely recommending a provisional measure to preserve the *status quo*. The dispute had reverted to conditions which govern the procedure of the Council under Article XI, paragraph 1 (war or threat of war), when the Council can properly exercise any kind

[1] O. J., Mar. 1923, p. 239. (Minutes of the Council.)
[2] Ibid., p. 240.

of pressure it thinks fit, and M. Viviani would have been better advised if he had drawn attention to the powers of the Council under Article XI, paragraph 1.

When the Council, acting in pursuance of Article XV, recommends a settlement, the adoption of which by the parties involves the creation of permanent legal rights, and the question is not complicated by threats of war, it cannot take steps to enforce acceptance. This was clearly the intention of the drafters of the Covenant, as is shown by the fact that Article XV, paragraph 6, in one of its original forms, provided that in the event of a party refusing a unanimous recommendation, none of the members of the League 'will go to war with any party which complies with its recommendations, *and that if any party shall refuse so to comply, the Council shall consider what steps can best be taken to give effect to their recommendations*'.[1] Strong objections were made by the representatives of Great Britain and the United States to the italicized clause providing for enforcement on the part of the Council, and it was omitted from the final text of the Covenant.

The practice of the Council, which, of course, gives the final word on the meaning of the Covenant, whatever the intentions of the drafters may have been, confirms this reading. In the Hungarian Optants dispute, the Committee of the Council, of which Sir A. Chamberlain was Rapporteur, recommended at one stage[2] that the parties should accept definite legal principles in accordance with which the Mixed Arbitral Tribunal should be authorized to continue its duties. The Committee went farther, and, for the first time in the history of the Council, suggested that the Council should take definite steps to enforce the recommendation. The precise wording had better be given here.

'In the event of a refusal by Hungary . . . the Council would not be justified in appointing the two deputy members in accordance with Article 239 of the Treaty of Trianon.

[1] Miller, *The Drafting of the Covenant*, vol. i, p. 194.

[2] See p. 195.

'In the event of a refusal by Rumania, in spite of the acceptance by Hungary of the above proposals . . . the Council would be justified in taking appropriate measures to ensure in any case the satisfactory working of the Tribunal.

'In the event of a refusal of the above recommendations by both parties . . . the Council will have discharged the duty laid upon it by Article XI of the Covenant.'

The Committee were, in effect, asking that the Council should use a form of sanctions against the party that refused to comply with the recommendation. The members of the Council doubted the wisdom and validity of this part of Sir Austen Chamberlain's report.

The Italian representative, M. Scialoja, expressed himself thus:

'What will happen if the parties do not agree and do not accept the friendly intervention of the Council? We shall see. I do not, however, think that for the moment we can talk of threats or sanctions. We do not know that the parties will not agree. Even if around this table contradictory declarations are maintained, we can hope that time, which is the best ally and adviser of the Council in this matter, may help us, I do not say to force the parties to agree, but to make them more prudent, more anxious to join us in eliminating this cause of danger to peace.' [1]

M. Scialoja's intervention was decisive, and expressed the feeling that the Committee's proposal was not consistent with the practice of the Council acting in pursuance of the Articles of the Covenant, and the enforcement clauses were dropped.

Whilst the foregoing examples (which include all the cases of the kind which have occurred) justify Professor Brierly's reading of paragraph 6 of Article XV— 'a party which accepts a unanimous report is guaranteed against attack by the other'—we can find no justification for the

[1] Herr Stresemann expressed himself thus: 'It is quite true that the Council can express its opinion on the juridical situation and can recommend to the parties the acceptance of those views. It cannot, however, force them upon the parties, causing the fulfilment of a demand upon them.'

view that the party that complies will in practice be free to go to war with the dissentient party. On the contrary, the Council will endeavour to prevent him from going to war.

Although the occasion has not arisen for such preventive action, the conception of the Council's duties under Article XI have been in later years greatly elaborated; in the memoranda of the Commissions on Security and Arbitration (1928)[1] approved by the 9th Assembly, it is laid down that 'under Article XI, the League of Nations has the most extensive competence. . . . Its authority is exercised in any war—not only in a war contrary to Articles XII, XIII, and XV, but also in a war which is not contrary to those Articles. If the procedure of Article XV fails, Article XI remains applicable and offers a possibility of renewing efforts to prevent war'. . . . The memorandum states specifically that Article XI is still applicable when the Council is unanimous in recommending a solution, and the solution is rejected by one or both the parties. 'The Council may always obtain information as to what the parties propose to do after the expiry of the time-limits provided for in Article XII. It may recommend the parties to extend these time limits. It may propose measures to prevent the situation from becoming more acute.'

Summing up our survey of the second possibility (where one of the parties rejects a unanimous recommendation), we note that the Council will not leave the parties free to take their own course; it will rather endeavour to secure agreement by proposing fresh solutions or mediating in the strict sense without suggesting any settlement, the formulation of which it may leave to the parties.

The Council will prevent the dissentient party from making war on the other party, but it will equally endeavour to prevent the party that complies from making war.

[1] Memorandum on Articles X, XI, XVI of the Covenant (Rutgers), pp. 28–31, C. A. S. 10.

(3) *The Recommendation is rejected by both Parties.*

The Recommendation may be rejected by both parties, and, in that event, each had, according to Mr. Noel Baker,[1] 'a right of war against the other'.

The practice of the Council shows that this right could not be so freely exercised: in effect it is nullified. The single case, namely, the dispute between Poland and Lithuania, which provides an example of both parties rejecting the Council's recommendation, shows that the Council conceives its duty in such circumstances to be the maintenance of peace. Such action, taken moreover in the period prior to the Kellogg Pact, demonstrates the far-reaching scope of Article XI.

The circumstances were as follows: The Council had made exhaustive efforts to secure agreement between the parties as to the fate of the Vilna territory; it had proposed one solution after another, made an abortive attempt to decide by the aid of a plebiscite, and tried direct mediation in a neutral city (Brussels) under the chairmanship of M. Hymans, the Belgian Member of the Council. When finally, after twelve months' endeavour, the recommendations, based on M. Hymans' conversations were rejected by both parties, the Council had no other course but to apply paragraph 4 of Article XV—a drastic course to which it resorts very rarely, and which expressly puts an end to its procedure of conciliation. But although it no longer recommended a settlement, it proceeded to take conservatory measures to safeguard peace, such as are possible under Article XI, and instructed a neutral expert (the Spanish Consul in Brussels) to proceed to the spot and propose to the Council a provisional line of demarcation, on either side of which the parties could set up their respective administrations temporarily and put an end to the anarchic conditions prevailing in the neutral zone of the Vilna region. We have just observed, also, how the members of the Council warned Lithuania of the conse-

[1] P. N. Baker, *The Geneva Protocol*, p 29.

quences of forcibly upsetting this provisional arrangement. Article XI, and possibly Article XVI, would still be operative to prevent war, in spite of the fact that the Council had ended its attempts at conciliation.

Again and again the Council has intervened at long intervals over a long period of years to prevent the parties —Poland and Lithuania—from going to war; in 1927 it requested neutral military attachés to visit the troubled region to forestall the possibility of any hostile events.[1] The Council, again, has sat through long innumerable discussions at which M. Valdemaras, the Lithuanian Prime Minister, delivered long and wearisome speeches, frequently obstructive, the Council exercising great forbearance in the interests of peace and acting as a sort of shock-absorber wearing out the passions of the stubborn parties.

Theory has progressed to keep pace with practice. The principles of the Rutgers Memorandum, quoted above, apply equally here; Article XI again becomes operative after the Council has attempted and failed to arrive at a settlement owing to the stubbornness of both parties.

(4) *The Council may fail to arrive at a unanimous recommendation (exclusive of the Parties).*

We now reach the fourth possibility, where the Council fails to arrive at a unanimous recommendation and, in accordance with paragraph 7, 'reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice'. The last words are significant: 'the maintenance of right and justice', not the 'maintenance of peace'. Were we to assume that after the three months' delay the parties and anybody and everybody were free to go to war to maintain 'right and justice'? By no means.

Examining the practice, we shall observe that in no single case in the entire history of the League has the

[1] See also Chapter II, Part III, Commission of Inquiry, p. 140.

Council failed to arrive at a unanimous decision exclusive of the parties. On every occasion it has succeeded; the Council will indeed endeavour so to draft its recommendations as to arrive at a unanimous agreement. In most cases, it has readily accepted the proposals of its Rapporteur, or Committees. Whenever a unanimous approval of any particular recommendation seemed impossible, the Council strove by patient discussions to find a way out, and adjourned and resumed them until at last some basis of a unanimous agreement was found. This has occurred on two outstanding occasions.[1]

The practice of the Council shows, therefore, that the members have so profound a sense of their responsibilities that at all cost they will attain unanimity. But even if in some totally unlikely event they fail to make a unanimous recommendation proposing this or that settlement, their duties will still be to prevent war. This again is clearly stated in the Rutgers Memorandum on Articles X, XI, and XVI approved by the 9th Assembly, which has been quoted above.[2] 'Article XI is still applicable when the procedure under Article XV has been exhausted . . . and the Council is not able to recommend a solution unanimously.' Where the Council may not be able to agree on the merits of a dispute, it will surely be unanimous in taking action to prevent the outbreak of hostilities. In these circumstances, all the conservatory measures discussed in Part II can be applied in order to prevent hostilities *after*, as well as *before*, the attempt at a settlement of the issues.

[1] (1) Hungarian Optants. Sir Austen Chamberlain's Report proposing reference back of dispute to Arbitral Tribunal subject to acceptance of new arbitral agreement rejected after long discussion by the Council; another proposal made to ensure agreement. See p. 195.

(2) Salamis. Recommendation of Committee of Three proposing request for advisory opinion failed to obtain unanimous approval; fresh proposal providing for consultation of Committee of Jurists agreed to unanimously and adopted. See p. 223.

[2] See p. 236.

The so-called 'gaps' of the Covenant.

The three possibilities which we have considered, namely the rejection by one or both parties of the Council's recommendation, or the failure of the Council to take a unanimous vote (exclusive of the parties) have been regarded as the loopholes or 'gaps in the Covenant', which were said to enable a State ultimately to slip away from the control of the Council and make war. In the foregoing analysis it is manifest that the gaps were more theoretical than real; the safeguards provided by the overriding powers of Article XI which, as we have noted, may be applied again and again after procedure under Article XV has failed, tended effectively to 'fill up' the gaps. It is, indeed, regrettable that this 'misleading metaphor'[1] obtained such currency, and spread so mistaken a conception of the Council's powers to preserve peace, and thus hindered a more rapid growth of the sense of security, which a proper appreciation of the League machinery would have inspired.

The emphasis given to the idea may perhaps be due to continental writers, who are accustomed to assess the potentialities of an institution more by examining its written constitution than by its actual practice; as the League has a written constitution and as Great Britain plays such a large part in its development, it is necessary to combine both methods of approach.

The Kellogg Pact modifies Articles XII and XV.

As the Council acquires more experience and develops its jurisprudence, it is inevitable that some parts of the text should become less significant than other parts: practice lending authority to one clause and, in effect, nullifying some other clause. Moreover, new treaties[2]

[1] Compare Professor Brierly, *Law of Nations*, p. 213.

[2] e.g. Model Arbitration and Conciliation Treaties (9th Assembly).

between States Members may gradually effect juridically what the practice has more or less established. The most comprehensive example is provided by the Kellogg Pact, to which the United States of America and Russia as well as Members of the League have given their adhesion. Clause 2 of the Kellogg Pact[1] commits every signatory in the most absolute terms to settle every dispute by 'pacific means'. Mr. Hunter Miller, one of the American drafters of the Covenant, thus estimates its effect:

'In the case of the so-called gap in the Covenant,' he writes,[2] 'the parties to the dispute regain liberty of action after a stated interval. The history of the League shows that the just view is that such a failure of unanimity could not occur in fact; but if it could, the provisions of the Covenant for liberty of action in such case are now supplemented by a general agreement of the Members of the League for a settlement by "pacific means": just as they had been supplemented as among many Powers by other agreements of arbitration and conciliation.'

In conclusion, we may, therefore, perhaps safely state that the recommendations of the Council, aiming at permanent settlements, arrived at unanimously exclusive of the parties cannot be lawfully enforced by threats of war, or resort to war by the party that complies. The party that dissents is obviously precluded from going to war in face of the decision.

The persuasive character of action under Article XV is thus emphasized, not only by the practice of the Council and theories of the League Security Commissions, but also by the legal obligations incurred by all the Members of the League in signing the Kellogg Pact. A recommendation under Article XV seems only to have virtually binding force to a greater or less degree where it is based on an advisory opinion, or on Reports of Commissions of Inquiry

[1] Clause 2 of the Kellogg Pact reads: 'The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature they may be, which may arise among them, shall never be sought except by pacific means.'

[2] David Hunter Miller, *Pact of Paris*, p. 143.

which the Council sets up with the approval of the parties. It is obviously desirable that no solutions, good or bad, should be imposed by war or threats of war, and it is, therefore, gratifying to note that the jurisprudence of the League as established by the practice and views of the Council has developed thus far in the first ten years of its history.[1]

[1] The speech of the British Prime Minister (Mr. Ramsay MacDonald) at the 10th Assembly, September 1929, marks the culmination of this development which gives to Article XI overriding powers to intervene and prevent a war at any and every stage, before or after an attempted settlement under Article XV, because he went so far as to propose that Articles XII and XV of the Covenant be amended so as to conform to the Kellogg Pact—he might also have said, so as to conform to the practice of the Council pursued long before the Kellogg Pact was proposed.

The British Government's amendment proposed to transform Article XII into a plain obligation not to resort to war and to delete the words 'until three months after the award by the arbitrators . . . or the report by the Council', and to make consequential changes in Article XIII, paragraph 4, and Article XV, paragraph 6. The 10th Assembly referred the question to a Committee for report at its next session, and its resolution further declared that 'it is desirable that the terms of the Covenant of the League should not accord any longer to the Members of the League a right to have recourse to war in cases in which that right has been renounced by the provisions of the Kellogg Pact'.

VII

GENERAL CONCLUSIONS

Section I. VALUE OF THE COUNCIL AS A CONCILIATION COMMISSION

THE survey of the Council's activities which has been attempted in the preceding pages in as complete a form as possible permits one to estimate the value of the Council as a conciliation commission, as a body capable of settling disputes which might have led to war, or which had already caused in many cases an outbreak of hostilities.[1] The unique value of the institution must surely be manifest to the most prejudiced reader. The survey reveals a mediatory system which is something organic and living, adaptable to every kind of dispute which the ever varying circumstances of international life may throw up, a system whose freedom and elasticity could only be provided by a body possessing the authority of the Council as the executive instrument of governments, with powers and a constitution of its own, as opposed to an *ad hoc* tribunal brought into being merely for the purposes of a particular dispute, and not possessing any powers in its own right.

(*a*) *New forms of conciliation*

Conciliation in the ordinary sense merely brings the two parties together under the chairmanship of a neutral who, with or without the help of other neutrals, would suggest a means of settlement. But when the Council proceeds to conciliate the disputants, the method may extend itself into new forms exploiting all the resources and powers which the Council of the League possesses as a constitutional body meeting in regular session. We have noted[2]

[1] Such outbreaks the Council has at once ended by resort to its preventive measures under Article XI. See Part II.

[2] In Chapters II and III, Part III.

how disputes submitted to the Council in the first instance for mediatory solution may become readily amenable, owing to the rich resources of the Council, to stricter methods, and may be solved by judicial or quasi-arbitral means, in which the rôle of the parties became almost as passive—in regard to the formulation of the settlement—as it would be in an ordinarily contested suit, for in such cases the Council may induce the parties to consent to the request for an advisory opinion, and so virtually refer the dispute to settlement by the Permanent Court: or to consent to an investigation by a neutral Commission of Inquiry.

We noted[1] how an advisory opinion by passing on the merits of a dispute is equivalent to an award or decision, and that several disputes though in form submitted to conciliation by the Council were in substance settled by judicial means. Again, the impartial character of settlements reached by the Council by means of Commissions of Inquiry was plainly evident. We observed how the members of the Commissions in every case were selected from countries neutral to the conflict; again, they were chosen not by the disputants but by neutrals—the members of the Council—and represented varied professions providing the special skill required for dealing with the circumstances of a particular dispute: it was noted that such Commissions were authorized in each case by the Council to propose a solution on the basis of the facts ascertained on the spot; the Council thus achieving a notable advance in their evolution. For, as viewed by the Bryan Treaties, such bodies 'had no power to register a decree, and even halted on the brink of offering a suggestion or recommendation. They simply investigated the facts at issue between nations, and reported their findings, leaving the disputants free to take such action as they may think best'.[2] The superiority of the Council as

[1] In Chapter III, Part III.

[2] *The Pact of Paris and War as an Instrument of National Policy*, by J. T. Shotwell (1929), p. 249.

a pacific organ is thus shown to lie not only in its executive power of choosing the Commissioners best suited to the task of investigation, but also in authorizing them to make proposals objectively based on the facts, and finally to present those objective proposals to the Council which would use its great authority to induce the parties to accept them. Presented in such circumstances, such reports, though advisory, virtually acquire the nature of an arbitral award, uninfluenced by extraneous political considerations.[1]

We noted again a third method[2] by means of which the Council confines itself to conciliation in its simpler or more rudimentary form, relying on its own efforts, or that of a committee of its members, or of those of the Rapporteur conducting negotiations between the parties in some neutral city. By its direct methods the Council has frequently succeeded in inducing the parties, by negotiating between themselves, to arrive at an amicable agreement—a friendly agreement between the parties is, of course, the ideal form of settlement which the Council whenever possible tries to effect; or the Council may endeavour, by way of conciliation in the ordinary sense (with or without the help of a Committee of the Council assisted by its own jurists and technical staff) to make recommendations and to persuade the parties to accept them.

The composition of the Council with its five Permanent members representing the great nations, Great Britain, France, Germany, Italy, Japan, and its nine non-Permanent members elected in rotation by the Assembly, representing the smaller nations, is sufficiently diverse to create a preponderance of disinterested States in any given dispute, and the Rapporteur and Committee of the Council entrusted with the investigation have always been chosen by the Council from among the disinterested members—with one or two exceptions, which occurred however in the

[1] See Mosul Report, p. 148. Report of Rumbold Commission, p. 155.
[2] Chapter IV, Part III.

first year of the League before its practice had become established.

In this respect again, where the Council is acting as a conciliation commission in the narrower sense, its practice registers a great advance on the idea of conciliation commissions specially set up by treaties between particular States, notably those of Locarno in 1925, the members of which are chosen by the contracting parties; in the case of League mediation, the parties appear before neutral conciliators not of their own choice; again the ordinary conciliation is conducted in secret, providing no safeguard against undue political pressure; whilst the procedure of conciliation by the Council is governed by the Covenant, with its provision for open diplomacy and other safeguards ensuring impartial recommendations such as the requirement of unanimity, enabling neutral States with a high sense of public duty to exercise their impartial influence.

(*b*) *The Council's Choice of Methods*

In choosing its methods, the Council has shown commendable wisdom. It would be vain to lay down precise rules providing for the settlement of disputes of a certain class in one way, and of a different class in some other way. Though a case may appear superficially to belong to a recognized group, a close examination may reveal other attributes. Here again is shown another advantage possessed by the Council: the opening discussions[1] provide a kind of preliminary investigation which enables the Council to choose the means most suitable to bring about agreement: any other tribunal would have only one means before it.

It is remarkable to note that the Council has preferred to settle a large proportion of the total number of cases[2] so far referred to it in pursuance of the Articles of the Covenant, and certainly the great majority of the important cases, by those strictly objective means which we

[1] See p. 126.

[2] These were 23 in number to the end of 1928.

have described as judicial or quasi-arbitral (that is by means of advisory opinions or neutral Commissions of Inquiry).[1]

It has not in general allowed any political considerations to deflect its judgement in exercising its choice. When questions of fact needed to be established—the geographical, political, economic, strategic facts pertaining to an area that had to be attributed to this or that State, or again the facts establishing responsibility for a breach of international obligations by a State, such as invasion of a neighbour's territory—the Council readily appointed Commissions of Inquiry to establish them, and achieved in each of the five or six cases a great success. On the one occasion where the factors in the dispute possibly called for such a method—the Upper Silesia case—and the Council lacking sufficient experience (in the first twelve months of the League's life) relied on its direct methods, its success was not so complete.

Again, where disputes as to existing rights occurred, for example, a question of interpretation of treaties, the Council did not hesitate, provided the parties consented,

[1] COMMISSIONS OF INQUIRY formulated the settlements of the following disputes:

1. Aaland Islands (Finland and Sweden), 1920.
2. Albanian-Yugoslav frontier disturbances, 1921.
3. Memel (Lithuania and the Allied Powers).
4. Mosul (Great Britain and Turkey), 1925 (though not in pursuance of the Covenant).
5. Greco-Bulgar dispute, 1925. (Reparation for invasion.)

THE ADVISORY OPINIONS of the Permanent Court formed the basis of settlement in the following four cases:

1. Poland and Czecho-Slovakia (Jaworzina), 1923.
2. Yugoslavia and Albania (St. Naoum), 1924.
3. Greece and Turkey (compulsory exchange of populations), 1924.
4. Greece and Turkey (Mixed Commissioners' Duties), 1928.

Advisory opinions though not so directly bearing on the substance of the question played an important part in the following cases which we may, therefore, add to the foregoing:

5. Eastern Carelia (Finland and Russia), 1923.
6. Tunis Nationality Decree (France and Great Britain), 1921.

Both classes total eleven.

to resort to the appropriate method, namely a request for an advisory opinion from the Court, which bearing on the substance was equivalent to an award by the Court.

If we exclude, as we must obviously do, those cases in which the Council succeeds in inducing the parties to resume negotiations and arrive at an amicable agreement, (there were five such cases),[1] and those which the Council declared it was not competent to settle,[2] we are left with only two or three notable cases which the Council has endeavoured to settle by its direct methods, and they include the Hungarian Optant and the Upper Silesia cases, both of which have been fully described in Chapter IV in order to illustrate those methods.[3]

The former case belonged to a class of disputes which is eminently suited to treatment by the Council, namely where the parties cannot agree as to the principles governing an arbitration. The Council of the League representing Sovereign States in Conference possesses in a unique degree the necessary authority to settle such a question.

Questions which do not relate to existing rights but

[1] 1. Panama and Republic of Costa Rica (U.S. mediation accepted by Council).

2. Yugoslavia and Austria (Liquidation of property).

3. Bulgaria and neighbouring States (Incursion of bandits).

4. Greece and Turkey. Expulsion of the Oecumenical Patriarch.

5. Ethiopia's protest to the Council against an agreement between Great Britain and Italy.

[2] 1. Greece and Turkey (delimitation of frontier; Maritza). See p. 222.

2. Greece and Albania (Minorities), p. 225.

[3] The Council has attempted to settle by its direct methods—

1. Polish-Lithuanian case: during the Brussels Conversations under M. Hymans.

2. Upper Silesia, 1921.

3. Two minor frontier questions: (*a*) Hungary and Czecho-Slovakia (frontier delimitation), 1923; (*b*) Austria and Hungary (frontier delimitation).

4. Hungarian Optants, 1923–7.

5. Greece and Italy (Corfu), 1923: though this is a border line case and more appropriately belongs to cases illustrating action taken by the Council to end hostilities (see Part II)—action which the Council must obviously itself undertake.

concern rights in the future, that is to say questions which may be described as 'legislative', requiring new treaty engagements, are appropriately dealt with by the Council. Its potentialities in this field have further to be explored, and they augur well for the future peace of the world in promising pacific means for changing the *status quo* or effecting the revision of treaties.

The choice thus exercised by the Council sets up a creditable record, and affords proof of its disinterested conduct in settling disputes, and should silence those critics who hold that the Council is incapable of impartial judgement: such criticism is usually made by those who may have allowed themselves to be dominated by some particular incident and have not been able to survey the Council's activities as a whole; or by those who whenever Governments are gathered together credit them as a matter of course with the lowest motives.

(*c*) *Its executive authority.*

The Council has other resources which add to its efficiency as a conciliation commission and which are derived from its authority as the executive instrument of the League.

It can occasionally take decisions of a governmental kind and set up organizations to implement its settlements; for instance in the Greco-Bulgar dispute, 1925, the Council provided—with the consent of the parties—for the appointment of two neutral officers to remain for a period of years on the Greco-Bulgar frontier to supervise the reorganized frontier guard system.[1]

Again, while the Council is attempting a settlement, it can maintain a firm practical hold of the situation: thus on the reopening of the Polish-Lithuanian dispute before the Council in 1927, the President of the Council after the discussions at the autumn session dispatched neutral military attaches to the 'spot' to discover whether Lithuania's fear of a Polish attack were well founded.

[1] See p. 160.

The same dispute illustrates the right of the Council under the Covenant to intervene when the parties are slow in coming to a settlement, and the delay affects the rights of third parties.[1]

Again, in the event of a failure to agree to a final recommendation in the circumstances described in Chapter VI, the Council continues in virtue of Article XI to keep firm control of the situation and prevents an outbreak of hostilities or the development of a rupture.

To allow time to work its conciliatory influence on two stubborn parties is indeed one of the most valuable and the least appreciated of the Council's resources. As Sir Eric Drummond very pertinently writes:

'Perhaps a commoner form of disparagement of the League is that difficult questions are often adjourned from one session of the Council to another. But the League works by persuasion, not by force; and it cannot immediately impose its will on a recalcitrant party. Time must be given for the moral pressure of world opinion to exert its forces. The Council meets every three months, but the settlement of disputes between individuals, between national organizations often requires years. Why should the League be expected more rapidly to solve international problems which deeply affect national feelings and perhaps national interests? In such cases it should suffice that the countries concerned are with or without the help of the League working toward a peaceful settlement.'[3]

Those who fail to realize the limits of arbitration or judicial settlement[4] as a method of settling disputes should ponder well these words. Such people imagine that by these methods they can enforce a swift short cut out of any and every impasse in which two States may find themselves. Judicial means are suitable for settling disputes about existing rights, but not about rights in the future. Wars are usually caused by disputes of the latter class: and when new rights are to be created the States

[1] Chapter III, Part III, p. 140.

[3] Sir Eric Drummond, *The Spectator*, Nov. 3, 1928.

[4] See J. L. Brierly, *Law of Nations*, p. 184.

concerned wish to have a voice in their creation, in other words, such disputes are usually settled by conciliation. Hence the value of the Council of the League in providing not only the means of settlement but also, if its efforts do not immediately win success, in safeguarding peace while time softens the stubborn wills of the parties.

(*d*) *Its Regular Sessions.*

The Council as a conciliatory body again derives a unique advantage from the fact that it meets in regular session four times a year,[1] whether or not disputes form a part of its agenda. It does not become atrophied or 'rusty' by disuse as do so many conciliation commissions.[2] For disputes likely to lead to a rupture and which cannot be settled by diplomacy are fortunately rare. Most of the disputes handled by the Council—about 17 out of 23—occurred in the abnormal post-war period 1920–3 and were nearly all directly concerned with the application

[1] From September 1929, three times a year.

[2] Grave objections would equally apply to the project of a Permanent International Conciliation Commission (advocated by those critics who believe contrary to the facts that the Council is incapable of impartial conduct). These critics would go so far as to attempt to transfer the task of pacific settlement to a specially created body consisting, not of representatives of Governments, but of men chosen for their impartiality and aloofness: such an academic project mistakes the object of League conciliation which is to induce Governments to settle their own disputes at the Conference table. Such a step would be a set-back to the progress of pacific settlement. An International Conciliation Commission would have none of the additional resources enumerated above which the Council of the League possesses; its methods would not be capable of organic growth and expansion, it would be bound by rules devoted to a single purpose, and would represent only the more rudimentary aspect of the Council's conciliation activities. It could not, for instance, virtually transfer a dispute to settlement by the Court by asking for an advisory opinion: it would not possess any of the executive powers which the Council has already utilized, its recommendations would not represent the direct will of Governments, nor could such a body provide any control over the situation if no agreement could be arrived at. It would do positive harm in so far as it would put a stop to the growth of the jurisprudence of the League, and strike a blow at the beginnings of co-operation between Governments.

of the peace treaties: in the following years, 'it became clear', as stated by Sir Eric Drummond, 'that the exercise of the duty of maintaining peace was insufficient of itself to promote in any great degree that international co-operation on which the Preamble of the Covenant lays stress.'

(*e*) *Beginnings of International Government.*

The attendance by Ministers bearing the highest responsibility—a practice established by Sir Austen Chamberlain—is essential when the Council has to take action to safeguard peace;[1] it is extremely valuable also when the Council has to propose settlements: for one may be sure that the proposals made would be workable, and would be carried out, as they are sponsored by members of Governments.

It is also of the greatest importance that Ministers should acquire a first-hand knowledge of causes likely to disturb the peace of the world so that steps can be taken to remove them. Sir Maurice Hankey, Secretary to the British Cabinet, whose intimate experience of diplomatic conferences gives unique authority to his words, regards as vital the attendance of responsible Ministers at the meetings of the Council for this very reason.[2] Diplomacy by conference, as Sir Maurice Hankey shows, can accomplish in days tasks which ordinary diplomacy could not complete in months; makes molehills of mountains and strips

[1] See Chapter IV, Part II.

[2] 'If the habit of meetings between responsible Ministers of different nations, the moment friction arose, through some organ such as the League of Nations had become the established practice before 1914 when the Archduke was assassinated at Sarajevo, it is possible that the War would not have occurred. The whole matter would have been probed and ventilated and the public opinion of the world would have been brought to bear to stop the War. It is possible even that the method of diplomacy by conference *might in time have eradicated the more fundamental causes of the war.* There may be room for wide differences of opinion about this or that detail of the Covenant, but all opinions would probably unite in the desirability that the leading statesmen of the Powers should meet . . .' (Paper read to Royal Institute of International Affairs, London.)

a problem to its irreducible minimum, misunderstandings and other impediments being removed by personal contact and by the friendships which Ministers inevitably make through frequent intercourse. It would, however, be a mistake to think that the activities of the Council can be accurately described by the term 'diplomacy by conference', as Professor Shotwell appears to do.[1] Such a description is in some respects misleading. The Council is something more than a diplomatic conference; it is not an assemblage of Powers, bound by no law, each one striving to obtain some particular or selfish advantage: when Foreign Ministers sit at the Council table they do not merely represent their own countries, they assume special responsibilities, as members of the executive council of the League, and are each, great and small, equally subject to the laws and principles of the Covenant: the psychology of a Council meeting is based to a large extent on a sense of collective responsibility for the maintenance of the peace of the world, as any one who cares to attend the meetings of the Council can verify for himself. This feeling of loyal co-operation is strikingly evident when the Council has to deal with disputes which threaten a rupture. The functions of the Council point rather to the beginnings of a form of international co-operative government regulating the conduct of Sovereign States, restricting the freedom of each in order to safeguard the freedom of all.

Section 2. THE PATH TO PEACE

The Council's twofold capacity.

In finally concluding our survey, we should associate the powers of the Council to settle disputes, which we have described in Part III, with its powers to prevent war which were discussed in Part II:[2] the one group of duties is a necessary complement of the other. On the one hand, the

[1] Professor J. T. Shotwell, *War as an Instrument of National Policy*, p. 252.

[2] See Chapter IV, Part II, which sums up the value of the measures taken by the Council under Article XI to prevent war.

Council conciliates the disputants at an early stage of the quarrel when the causes which might have led to hostilities are removed; on the other, the Council immediately intervenes, on an outbreak of hostilities, to separate the combatants and to effect the 'Cease fire', however righteous the resort to arms might have been, whether in self-defence[1] against a wanton aggressor, or for any other reason. Again, the Council in proposing a settlement is not content to patch up a hasty compromise to tide over a crisis—these are the methods of ordinary diplomacy—it seeks finally to clear up a situation and leave no festering elements under the surface. Finally, when hostilities have broken out, the Council's first thought is not to come to the aid of either of the parties, the supposed victim of the other, the aggressor—these are the old pre-League methods of guaranteeing peace, a relic of which still remains in the military clauses of the unused Article XVI—but at once to stop the fighting on both sides.

In its twofold capacity of ending a war or hostilities and removing a probable cause of war, the Council has found its powers under Articles XI and XV to be sufficient and effective. During the first ten years of its life the Council has successfully dealt with seventeen cases likely to lead to a rupture, and brought to an immediate end hostilities which had broken out on seven or eight occasions between Members of the League.[2] This has been accomplished by pacific means, the Council exercising its moral and political authority, supported by world public opinion, which is increasingly sensitive in relation to the League; whilst the disputants, reminded of their solemn obligations as signatories of the Covenant, have felt themselves compelled to yield before this moral pressure.

No elaborate plans laid down in advance binding the Council to certain military measures in certain contingencies contributed to this success. No complicated formulae with which security Commissions have vainly attempted to supplement the provisions of the Covenant were

[1] See p. 58. [2] See p. 19.

required. The action was not delayed by a need for a definition of aggression or self-defence. Under Article XI it was sufficient that 'war or threat of war should be a concern of the League' in order at once to request both parties to cease fighting.[1]

The intervention of the President of the Council, the emergency meeting, the peace or 'armistice' commission, the mobilization of world opinion and other measures held in reserve aimed at preventing war by means other than war—these factors, providing no cut and dried plan but a living governmental organ free to take the action best suited to the unforeseen circumstances of each case—sufficed to ensure success. And when peace had been provisionally arranged, the Council in accordance with Article XV could proceed, with the consent and co-operation of both parties, as occurred in one case, to find which was responsible for the outbreak, and afterwards recommend that reparation be paid to the innocent party for any damages.

It is strange that the existence of this machinery, its successful operation, and the unrestricted right of the Council under the wide terms of Article XI to set it in motion in any and every circumstance, in every kind of war whether or not expressly forbidden by the Covenant, have not produced a greater sense of security in Europe, and, indeed, have been so little appreciated in general.

Allowance must, of course, be made for the fact that the League being a new institution time must elapse before it becomes an established tradition. Even so, the slow realization of its efficacy can partly be attributed to less inevitable causes. The scepticism of those who, for instance, exaggerate the failures of the League—Vilna, (1920), Corfu (1923), possibly Upper Silesia (1921); they do not sufficiently account for the fact that these cases all occurred in the abnormal period immediately following the end of the Great War, and before the final and general

[1] *Vide* Professor Manley O. Hudson, *Problems of Peace* (Third Series), p. 204.

conclusion of peace, when the permanent members of the League Council consisted solely of the Allies, and Germany was not yet a Member; and the League was passing through its experimental stage. The Council was still a body of minor importance, Ministers bearing the highest responsibility seldom, if ever, attending.[1] But, despite these initial handicaps, the Council in each case succeeded in preventing the outbreak of war. Its failures were comparative; its prime duty—the maintenance of peace—it was able always to fulfil in the cases submitted to it, even during the first years of its existence.

Greater harm perhaps is caused by a school of critics, (and they are to be found among the most ardent friends of the League), who, while they are more or less ready to admit the efficacy of the measures already put into operation—mediation, discussion, publicity, 'armistice'—doubt whether these would prove adequate in some future contingency. These critics hold that a sense of security will come when machinery is set up which enables Members of the League to make swift war on a wanton aggressor. Strange paradox. The purpose of the League is to prevent war: if war, in spite of its pacific efforts, breaks out, one can only register a failure: what object is served by inviting neutral members of the League to magnify that failure ten times over by taking part in that war?[2]

The supposition of a wanton aggressor stubbornly continuing to fight in defiance of the whole League dominated the minds of League adherents in the early days. A system of military sanctions, it was thought, seemed to be vitally necessary in any scheme of peace: the scope of Article XVI being regarded as doubtful, particularly after the 2nd Assembly had passed resolutions still further

[1] Professor Rappard gives an interesting table showing the proportion of Prime Ministers and Foreign Ministers attending Council Meetings. In the immediate post-war years 1921 and 1922, 0 per cent.; 1923, 2 per cent. Rising afterwards from 14 per cent. in 1924 to 50 per cent. in 1927, and 42.9 per cent. in 1928. (*Problems of Peace*, Third Series, p. 13.)

[2] Rutgers Memorandum on Article XI, approved by 9th Assembly, stresses the importance of localizing a conflict, p. 30, C. A. S. 10.

diminishing its significance, other means of providing material guarantees were explored, such as Draft Treaties of Mutual Assistance (1923), and the Geneva Protocol (1924): both schemes were rejected, and their rejection was by no means universally regretted, particularly in Great Britain, the British Dominions,[1] and the United States of America:[2] the Protocol in particular engaged the signatories definitely to go to war in certain contingencies in order to enforce peace. So definite a commitment to go to war was found to be in itself objectionable,[3] quite apart from the consideration that such schemes in the view of many competent critics were hardly practical.[4]

Those who place their main hopes on military 'sanctions' (that is, war under another name) are responsible for another source of distrust in the League. Some sceptics are eager to point out that the League could not possibly deal with grave disputes between great Powers: what if two great Powers, Members of the League, are determined to go to war, will any scheme of military sanctions suffice to restrain them, one is asked?

The answer is obvious. The application of military sanctions will be of little avail to the peoples of the

[1] The senior British Dominion, Canada, has expressed itself very positively on the question of military sanctions. In the official note (June 1, 1928) of the Canadian Government to the Government of the United States announcing its unreserved acceptance of the Kellogg Pact, it was stated 'that the pre-eminent value of the League lies in its positive and preventive action by developing the spirit of conciliation and the habit of co-operation, and in its machinery for the adjustment of differences. It points out that Canada has always opposed an interpretation of the Covenant which would involve the application of sanctions automatically or by the decision of other States, and it was on her initiative that the Fourth Assembly with a single negative vote accepted the interpretative resolution (to Article X) indicating that it was for the Constitutional authorities of each State to determine in what degree it was bound to assure the execution of the obligations of this Article by the employment of military forces'. (*The Times*, June 2, 1928).

[2] See 'America and the League', Professor Manley O. Hudson, *Problems of Peace* (Third Series).

[3] Sir A. Chamberlain, House of Commons, Nov. 24, 1927.

[4] *Pseudo-Security*, by J. M. Spaight, Longmans.

world in such a case: such action—call it what you will, 'sanctions', 'police action', 'public war'—would be war involving large scale destruction of human lives and treasure; unless the League can in such circumstances bring hostilities to an end by means other than war, it had better refrain from action.

If, on the other hand, emphasis is laid on those powers of the League—the persuasive and preventive measures taken under Articles XI and XV—which have already been put to the test, as this study has shown, this particular scepticism can be more easily met. In the event of a grave dispute between two great Powers, the provision for mediation by the Council, public discussion, and delay, would enable the two peoples directly concerned, supported by world opinion, to prevent a resort to arms. Such action is within the compass of the League, and what more effective safeguard can be devised than to allow at a crisis of such magnitude the fullest scope to the only final deterrent force—the will of the peoples threatened with war. If that will is not for peace, no machinery, however perfect, can prevent two great peoples going to war. As Professor Brierly states, 'no machinery for preserving the peace is of much use unless we are entitled to assume, as we probably are, that the vast majority of people in every state never want a war . . .'[1]

The practice of the Council is necessarily based on this assumption, and prevailing theory is according more and more with practice. Common sense views based on the League's experience are superseding speculative theories and plans: in the Rutgers Memorandum on Article XI, endorsed by the 9th Assembly, attempts are made to develop means—not to make war on an aggressor—but to improve and develop the means of prevention, of separating the combatants, of bringing about an armistice, in other words, to explore further the path to peace which the Council has discovered in its practice. We have already noted some of the very striking advances they

[1] J. L. Brierly, *Law of Nations.*

register, such as the application of Article XI not only *before* but *after* an attempt by the Council to agree on the merits of a dispute—an extension of practice which acquires greater significance since the Kellogg Pact was signed: for the Article has a further use in providing means of implementing the Pact in regard to disputes between Members of the League.

The prospects of the League Council succeeding as a peacemaker by relying on these measures which have been tested by experience seem to be bright. Such a consummation is devoutly to be hoped by every one. No one wants to see the League obliged to plunge into the doubtful experiment of resorting to war in order to end war. During the first ten years of its existence it has succeeded in restoring and preserving peace in respect of all disputes submitted to it. Its moral authority has grown with the years and has proved progressively effective.

To appreciate fully the powers which the Council, in its twofold capacity as guardian of the peace and as conciliator, has already found effective is the supreme need of the time. When these existing powers are appreciated by the nations to a far greater extent than they are now: when the new institution and its advantages will have sunk deep into the consciousness of the peoples; then the old habits that still persist in spite of the new conditions that render them superfluous—the old habits of maintaining large armaments will weaken, and disarmament plans long overdue, which the nations are pledged to carry out in accordance with Article VIII of the Covenant, will become realizable, and thus put an end to the disturbing fact of an effective machinery of peace existing side by side with a fully developed machinery of war.